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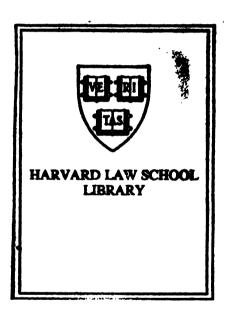
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REPORTS

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CASES

ARGUED AND DETERMINED

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IN

THE SUPPLEME COURT LAW SCHOOL LUBRARY.

By MERRITT M. ROBINSON.

FROM 10 MARCH, TO 20 MAY, 1844.

NEW ORLEANS. PUBLISHED FOR THE REPORTER.

1847.

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JUDGES

OF THE

SUPREME COURT,

DURING THE TIME OF THESE REPORTS.

Hon. FRANÇOIS XAVIER MARTIN. Hon. HENRY ADAMS BULLARD. Hon. ALONZO MORPHY. Hon. EDWARD SIMON. Hon. RICE GARLAND.

ATTORNEY GENERAL.

ISAAC T. PRESTON, Esq.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN THE

EASTERN DISTRICT, AT NEW ORLEANS, MARCH, 1844.

PRESENT:

Hon. FRANÇOIS XAVIER MARTIN.

Hon. HENRY ADAMS BULLARD.

HON. ALONZO MORPHY.

HON. EDWARD SIMON.

Hon. RICE GARLAND.

ROBERT LAYSON v. THOMAS ROWAN and another.

- In the State of Mississippi, in which the common law prevails, a debtor, though insolvent, may, by a deed of trust, grant a preference to a part of his creditors; and, having a right to determine which of them shall be paid, he may dictate the terms of payment.
- In the case of a mortgage or deed of trust, the possession of the property by the mortgagor or debtor, until the sale, is not inconsistent with the deed, and raises no presumption of fraud.
- The fact that one of the parties for whose benefit a deed of trust was executed by an insolvent, in another State, is a son of the debtor, does not authorize the conclusion, in the absence of other proof, that the debt is fraudulent.
- A debt, to secure which a deed of trust has been executed, may be described by the name of the debtor, and its amount be left to be ascertained. Id certum est, quod certum reddi potest.
- It is no objection to the validity of a deed of trust under the common law, that the cestui que trust is not a party to the deed, nor that the trustee is not a creditor of the debtor who executed it.

APPEAL from the District Court of the First District, Bu-Vol. VII.

chanan, J. This was an action for the balance due on a promissory note by the defendants, residents of the State of Missis-An attachment was levied on certain cotton and money, as the property of the defendants. The latter excepted to the jurisdiction of the court, on the ground, that no property of theirs had been attached, alleging, that the cotton seized belonged to one Woods; and they prayed, that the suit might be dismissed. The answer, subsequently filed, pleaded a general denial. Woods, representing himself to be a citizen of Mississippi, intervened, claiming the property attached. He alleges, that the cotton attached, the proceeds of which were seized, was shipped to New Orleans from the State of Mississippi; and that, before it left that State, he had acquired a perfect title thereto, by virtue of a deed of trust executed by the defendants, dated 1st October, 1842; that all the parties to the deed were residents of that State: that by the laws of that State, the deed of trust gave him a perfect title to the cotton, which he had reduced into possession; and that the proceeds of the portion of the cotton which had been sold, had been credited, by the factors who sold it, to him before notice of the attachment. The intervenor concludes by praying. that the cotton and the money attached may be adjudged to be his property, and for damages. The plaintiff answered the petition of intervention, by averring, that the claim of Woods was simulated and without consideration, and designed to hinder, deay, or defraud the creditors of the defendants. The latter afterwards pleaded payment and usury.

The evidence establishes the allegations of the intervenor; and the case turned upon the validity of the deed of trust to him, under the laws of the State of Mississippi. The deed to Woods is in the following words:

"This indenture, made the 1st day of October, 1842, between Thomas Rowan and James S. Rowan, of the first part, and Wiley M. Woods, of the second part, witnesses: That the said party of the first part, for and in consideration of the debts hereinafter named and secured, and of one dollar to them in hand paid, have this day bargained, sold, and delivered, and by these presents do bargain, sell, and deliver unto the said Woods, all the crops of corn, fodder, and cotton now growing and being gathered on the

following plantations, to wit: on the said Thomas Rowan's plantations in Wilkinson county and in Franklin county, and the plantation in Adams county, occupied and cultivated by James J. Rowan, to be delivered to him, the said Woods, or his agent, when gathered and prepared for market: In trust, however, that said Woods will sell the same at private sale, in the usual markets, for the customary prices, and with the proceeds thereof, pay: first, a judgment in favor of M. F. Degraffenreid against S. G. Rowan and others, on which the said Woods is bound as surety on a forthcoming bond, amounting to about \$3430; to Henderson & Franklin, an account due them by said Rowans of \$681 44; to Buckner, Stanton & Co., or their assigns, a balance due them by said Rowans of \$2352 42; to Herring, for his wages as overseer for the present year, \$500; the same to J. W. Rice, for same services; to J. M'Adams, his wages for teaching school this year, \$600; to William W. Rowan, a balance due him as overseer and manager for said Thomas Rowan, for several years past, about \$3000; and the residue thereof to pay to Thomas Henderson, to be by him applied to the purposes of a trust conferred on him by the deed of said Thomas Rowan, James J. Rowan, and Mary Rowan. In witness whereof, the said parties have hereunto set their hands and seals the day and year above written.

T. Rowan, [Seal.]
Jas. S. Rowan, [Seal.]
W. M. Woods." [Seal.]

The deed above referred to recites, that it is made between "Thomas Rowan, James S. Rowan, and Mary Rowan, of the first part; Thomas Henderson, of the second part; and the several and joint creditors of all, or any one, or more of the above named Rowans who shall accept their assignment, of the third part;" that the Rowans have thereby conveyed, in trust, to one Thomas Henderson, certain tracts of land, and all the cattle, horses, hogs, mules, sheep, farming utensils, tools, and implements of husbandry, household and kitchen furniture; and all the slaves thereon, and their increase, and the profits or proceeds of said plantation and slaves, with the corn, fodder, hay, &c.; together with a certain house and lot in the city of Natchez. After enumerating various debts due by the Rowans, the deed stipu-

lates, that they shall retain possession of all the property conveyed to Henderson, until the same is sold; that they shall be entitled to sell the growing crop, and, out of the proceeds, pay any small debts due by them, not provided for in the deed, the current expenses of the plantation and of their families, paying over the surplus to Henderson: that, after the year 1842, the whole net income of said personal and real estate, after defraving the expenses of their plantations and families, shall, in like manner, be paid over to Henderson, or that he may, at his option, take possession of all the cotton raised on said plantations as soon as it shall be ready for market, and sell the same at private sale, and with the proceeds pay, first, the current expenses of the plantations and of their families, as before mentioned; that Henderson shall, as funds may come into his hands, pay to each of the enumerated creditors, except one, a proportion of the funds, according to the amounts of their respective debts. The deed further provides, if the fund to be so annually distributed shall not pay twenty per cent on the whole amount of the debts, that Henderson may, at the request of a majority in amount of the said creditors, sell a part or the whole of said property for cash, the proceeds to be distributed as before mentioned, but the excepted creditor to be paid only after all the other creditors are satisfied; that if any surplus remain, it shall be paid to the Rowans; that if the funds received by the trustee, from the annual income of the property, suffice to pay twenty per cent annually on the whole amount of the enumerated debts, with the interest then due, no sale shall be made, nor any execution be issued under any judgment included in the list of debts, &c. There was a judgment of nonsuit below, and the plaintiff appealed.

R. H. Chinn, for the appellant.

Finney, for the defendants. The deed to the intervenor, Woods, is alleged to be void under a statute of Mississippi, intended to secure creditors and subsequent purchasers, without notice, against fraudulent loans and conveyances. Howard & Hutchinson's Dig. 370. The deed is alleged to be one calculated to "hinder, delay, and defraud creditors." But the proviso at the end of the act, expressly protects all conveyances made in good faith on the part of the grantee, and for a valuable consideration.

The deed to Woods was for a valuable consideration, and in good faith on the part of the grantee. Indeed, no fraudulent intent is proved against any one. A statute similar to the one quoted, is believed to exist in all the common law States. 'I'hat in Virginia is in the same words. They are all borrowed from the English statutes of the 13 and 27 Elizabeth. It has been repeatedly decided, both in England and the United States, that a debtor, though insolvent, may assign or convey his property to secure favorite creditors, to the exclusion of others, although such an arrangement would necessarily delay and hinder such other creditors, by diminishing or consuming the fund to which they would have to look for payment. 2 Johns. Ch. R. 283. ney, 513. But here it is not shown that the defendants were insolvent. A trustee, under a deed of trust to secure an honest debt, is a purchaser for valuable consideration, and, as such, pro-2 Johns. Ch. R. 189. So also, indemnity tected by the statute. is a valuable consideration under the statute. 1 Burr. 474. grantee in these cases is always protected, unless it is shown that he had notice of the fraudulent intent of the debtor to "delay, hinder, &c." He has a right to take a security, provided he be not privy to a fraudulent intent on the part of the grantor. it makes no difference how black may be the fraud of the latter. unless notice be traced to the former. 4 Randolph, 302. 4 East, 1 Binney, 513. It is objected, that there was no delivery of possession. This is idle. Delivery of possession to the trustee, never occurs on the execution of a deed of trust. It remains with the debtor, until the time to sell. 1 Tuck. Comm. Laws of Va. 338, 340, and cases there cited. 5 Rand. 252. The rule is, that the possession should be consistent with the deed.

Huston, on the same side.

Maybin, for the intervenor.

MARTIN, J. The plaintiff is appellant from a judgment of nonsuit. The action was brought upon a promissory note by process of attachment levied on a number of bales of cotton and on money, which were claimed by Woods, an intervening party. The cotton and the proceeds in money, so attached, were claimed by Woods as having been his property in the State of Mississippi, from which they were shipped to New Orleans. He claimed

under a deed of trust from the defendants, all the parties to which were residents and citizens of Mississippi, within which the cotton was at the time. He avers, that he did then and there take possession of it, thereby acquiring, under the laws of that State, a complete title thereto; and that, before the levying of the attachment, the money resulting from the sale of part of the cotton, had been credited by the consignees to him.

The case has been argued in this court by the counsel of the defendants, and of the intervening party; and the conclusion to which we have arrived in regard to the claim of the latter, renders it useless to notice the arguments of the former.

The plaintiff's counsel contends, that the deed of trust under which the intervening party claimed, is null and void: 1st, because the defendants were embarrassed; 2d, as the conveyance is of all their property; 3d, because they give a preference among their creditors; 4th, because they dictate terms to them; 5th, because the defendants retain possession; 6th, on the ground that the deed is for the benefit of the son of one of the defendants; 7th, because the amount of the debts is indefinite; 8th, because the cestuis que trust are not parties; 9th, on the ground that the trust was destructive of the property which was the object of it; 10th, because the trustee was no creditor; 11th, because the deed was voluntary; and 12th, as it was for the benefit of the grantors.

- 1. The embarrassment of a debtor is ordinarily the inducement to the execution of a deed of trust, by which he is enabled, in the countries where the common law of England prevails, to dispose of his property, not only for the benefit of all his creditors, but, at times, for that of particular ones. The counsel have admitted, that the common law prevails in the State of Mississippi; and have consented, that the printed statutes of that State, and any common law works, may be used in this case. From those authorities it appears, that a debtor is not prohibited from discriminating among his creditors and granting a preference to some. 2 John. Ch. R. 283. 1 Binney, 513.
- 2. It may be a badge of fraud in a conveyance or sale, not to a creditor, that the grantor or vendor disposes of all his property, for it will be presumed that his object is to leave nothing which his creditors may touch; but when the conveyance is a trust for

the benefit of his creditors, it cannot be objected to him, as an evidence of fraud, that he has retained nothing.

- 3. This objection has been answered with the first.
- 4. The debtor having a right, according to the law of Mississippi, to select such of his creditors as he intends to pay, may well propose to all or any of them, the terms on which the payment is to be made.
- 5. The possession of the vendor, after the sale, may be urged by third parties; but, in a mortgage or deed of trust, the possession of the property until the sale be made, is not inconsistent with the deed, and raises no presumption of fraud. 1 Tuck. Comm. Laws of Va. 338, 340, and cases there cited. Land v. Jeffries, 5 Rand. 252.
- 6. The son of one of the defendants is placed among the cestuis que trust, as a creditor for the sum of three thousand dollars, for services as an overseer. He is a young lad; but that, and his relationship to one of the defendants, do not authorize us to conclude that the debt is not a fair one, there being no evidence of the demand being fraudulent.
- 7. A debt may be described by the name of the creditor, and its amount left to be ascertained. Id certum est, quod certum reddi potest.
- 8. The cestuis que trust are probably never made parties to the deed; for, if they were, its character would be changed. It would become a mortgage or pledge, and the grantee would not be a trustee, for he would hold in his own right.
- 9. This objection is grounded on a fact from which the counsel draws a violent presumption of fraud, which he contends ought to induce us to set aside the deed of trust in favor of the intervening party. The defendants had originally granted to Henderson, for certain purposes, a deed of trust on several plantations, and the slaves and cattle, horses, &c., thereon, reserving to themselves the possession, and the crops in the meanwhile resulting therefrom. The deed of trust of the intervening party includes these crops, that is to say, the cotton, corn, fodder, hay, &c., which are to be sold by the trustee; so that, in the opinion of the counsel, the slaves, cattle, horses, mules, and every animal on

the plantations must starve, every part of the crop from which their sustenance had been provided for, being disposed of.

In retaining possession of the plantations, slaves, and animals, with the right of raising and disposing of the crops, the defendants certainly undertook the obligation to provide for the sustenance of the slaves and animals. But this obligation did not last longer than the possession. A violation of it cannot be urged by the second trustee, who had no interest in its performance. It was no fraud as to him, and cannot be urged by a third party as evidence of ill faith, either in the grantor or 'grantee; certainly not in the latter. Fraud will not be presumed; and the record not showing whether any, or what arrangements have been made with Henderson, the first trustee, we must presume that no injury was either intended or done to him; at least, none the knowledge of which is brought home to the intervening party.

- 10. This objection has been answered with the eighth.
- 11. It is of the essence of a deed, or contract, that it be voluntarily executed. If the assent be extorted, the deed or contract is null.
- 12. It is urged, that the deed is for the benefit of the grantors. It provides that the trustee, after complying with the terms of the trust, shall pay the balance remaining in his hands to Thomas Henderson, to be by him applied to the purposes of a former deed of trust of the defendants and Mary Rowan. By this former deed the grantors reserved to themselves, the right to pay, out of the crops sold by them, such small debts as they might owe, not provided for by the deed, the current expenses of the plantations and of their families, and the trustee, Henderson, had the option to take charge of the crops and sell them; but he was, out of the proceeds, to pay the current expenses of the plantations, and those of the families of the grantors. It is urged, that any balance remaining in the hands of Woods, after complying with the charges of the deed of trust to him, was to be paid to Henderson; and that out of it the grantors had secured to themselves the expenses of their families. It does not appear to us that they They might, indeed, retain those expenses out of the proceeds of the crops which they sold; and Henderson did not become bound to pay those expenses, except out of the crops of

which he took charge, and which he sold. No other funds in the hands of Henderson were made liable to those expenses; so, no balance which Woods might pay, could, in his hands, be liable to such expenses. It is clear that the deed to Woods secured nothing to the defendants.

The plaintiff did not attach any property of the defendants. He did not bring them into court, and judgment was correctly given against him.

Judgment affirmed.*

* Chinn, for a re-hearing. The question in this case is, whether the conveyance to Woods was made, in the language of the statute of Mississippi, to "hinder, delay, or defraud creditors." It is conceded, that a party may prefer one creditor to another; but if, by doing so, he attempt to secure any advantage to himself, the deed is void. The embarrassed condition of the grantor, from Twyne's case, reported by Coke, down to the present day, has been invariably regarded as a badge of fraud. 1 Coke's Rep. 836. 4 Bibb, 446. 3 Mar. 241. 2 Litt. 221. 3 Monroe, As to the conveyance being of all the grantor's property, see 4 Bibb, 165 Lord Kaimes, Principles of Equity, 492, 497. 5 Term Rep. 420. 1 Mar. 105. The retaining of possession by the vendors, is not merely evidence of fraud, but is a fraud per se. 2 Kent's Comm. 412. Where those for whose benefit a deed is made, are not parties to it, the deed is void. See Combs v. M'Kinley, 1 Monroe, 1. The objection that the deed to Woods was voluntary, has been misapprehended by the court, and confounded with the voluntary execution of it. A deed executed without consideration is voluntary, and such a deed is void. Any reservation in a deed of trust, or assignment, for the benefit of the grantors, avoids it. See 2 Kent, 422. The deed to Woods did secure something to the grantors. It provides, that the surplus, after paying the debts therein provided for, shall be paid to Henderson, to be by him applied to the purposes of the deed of trust to him. By the deed to Henderson, the grantors are secured the possession and enjoyment of their property, for the support of themselves and their families, upon paying annually twenty per cent on the amount of the debts enumerated in the deed.

In the case of Pitts' Trustees v. Viley, 4 Bibb, 446, four only of the twelve badges of fraud relied on in this case, presented themselves: 1st, Pitts was embarrassed; 2d, the conveyance was of all his estate, real and personal, and there was no covenant on the part of the trustee to fulfil the trust; 3d, Pitts was permitted to retain possession of the property, and to sell a part of it; 4th, the creditors were not consulted, nor were they parties to the deed. These circumstances induced the court to decide, that the conveyance was fraudulent. Boyle, J., in delivering the opinion of the court, remarks, that although separately considered, neither of these circumstances might suffice to defeat the deed, the whole, together, were conclusive evidence of an intent to hinder and delay the creditors of Pitts. But, in the present case, the deed is absolutely void, as the creditors, for whose benefit it

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was made, were not parties to it. In the case of M'Kinley and Combs, already quoted, Grimes executed a deed of trust of all his property to Judge M'Kinley, for the payment of all his debts. Combs, a creditor not provided for, resisted the conveyance, and the court decided, that inasmuch as M'Kinley was not a creditor, and the cestuis que trust were not parties, nor assented to it at the time of its execution, it was absolutely void as to Combs, a creditor. See also the cases in 1 J. J. Marshall's Rep. 213, 226, 342. 4 Monroe, 581.

The court have concluded, as no property of the defendants was attached, that the defendants were not before the court. But the record shows, that the defendants appeared by their counsel and pleaded.

Re-hearing refused.

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ELIZA R. WHITTEMORE v. JACOB J. WATTS, Sheriff.

Where the certificate of the clerk states that the record contains copies of all the documents on file, and a complete transcript of all the proceedings had, and of all the testimony adduced on the trial, it is sufficient.

An irregularity in the service of citation of appeal on one appellee, will not authorize the dismissal of the appeal on his motion, much less on that of his co-appellee.

Where an intervening party prays for a dissolution of an injunction obtained by plaintiff, and for interest and damages, the plaintiff cannot, by dismissing his suit, deprive the former of his right to a judgment.

APPEAL from the District Court of Livingston, Jones, J.

MARTIN, J. This suit was commenced by an injunction obtained by the plaintiff against the defendant, the Sheriff of the parish, to stay proceedings on a writ of fi. fa., under which he had seized property of the husband of the plaintiff, against whom the latter had a judgment of separation of property, which gave her a mortgage superior to that resulting from the judgment on which the writ of fi. fa. had issued.

Taylor and others, the plaintiffs in the writ of fi. fa. intervened, and prayed for the dissolution of the injunction, on the ground that they were not made parties to the suit, and on account of the insufficiency of the affidavit and petition.

The Sheriff filed an exception on the ground, that he is without interest in the suit, and that the plaintiffs in the fi. fa. are not parties; and he prays to be dismissed. The exception was overruled, and the intervening party appealed. The appeal was

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dismissed on the ground that it was premature, the application of the intervening party not having been acted upon below, and no irreparable injury having resulted to him from the Sheriff's exception being overruled.

The judgment of this court was entered on the minutes of the District Court, and the plaintiff having moved for the dismissal of her suit, which was accordingly entered at her cost, the intervening party has appealed, and made the plaintiff and Sheriff appellees.

The plaintiff and appellee has moved for the dismissal of the appeal, on the following grounds: 1st. That the record is not duly certified; 2d. That the appellants are not parties to the judgment appealed from, nor affected thereby; 3d. That the appeal was taken too late; 4th. That there is no judgment on the appellants' intervention or opposition; 5th. Because the citation of appeal was irregularly served on the Sheriff and appellee; 6th. Because the appellant made no opposition to the dismissal or discontinuance of the injunction.

- 1. The clerk's certificate states that the record contains copies of all the documents on file and of all the testimony.
- 2. The appellants intervened in the suit below, and thereby became parties thereto, praying for the dissolution of the injunction, for damages and costs. They are, therefore, affected by a judgment which dismisses the suit without any action on their claim for damages, and thus rejects their claim.
- 3. The judgment of dismissal now appealed from, was moved for and entered October 8, 1842, but was not signed by the Judge until October 3, 1843, the very day on which the appeal was granted. Counting the year during which the appeal was in time, from the day the judgment was entered, the party had still five days to appeal in; and counting from the signature of the Judge, the year had just begun.
- 4. There is, as to the appellants' opposition or intervention, a judgment against them which denies them what they ask, or, at least, refuses to allow it to them.
- 5. The irregularity in the service of the citation on the Sheriff would not authorize a dismissal of the appeal on his motion, much less on that of the plaintiff.

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6. It does not appear, and it is denied by the appellant's counsel, that the judgment of dismissal was given in his presence, or at the time of which he had notice.

It does not appear to us that the appeal ought to be dismissed. We are not to presume that other documents were used, than those on file; and the motion for a judgment of dismissal was not followed by any trial. The first appeal by the intervening party in this suit, was granted on the 3d of May, 1842, and not dismissed until the 28th of March, 1843. In the meanwhile, to wit, on the 8th of October, 1842, the plaintiff moved for a judgment of dismissal, which was accordingly entered. This was, as far as it concerned the intervening party and appellant, a nullity, as the District Court was, as to him, ousted of its jurisdiction by the appeal, whatever might be the effect of the dismissal between the plaintiff and the Sheriff. On the 3d of October, 1843, the District Judge affixed his signature to the judgment, after the jurisdiction of his court was restored by the dismissal of the appeal.

We are of opinion that he erred. The intervening party having prayed for a dissolution of the injunction, and for interest and damages, was entitled to them, and could not be deprived thereof by the act of the plaintiff. We have taken no notice of the Sheriff, because he has not been cited, and nothing is asked against him.

It is, therefore, ordered and decreed, that the judgment permitting the plaintiff to dismiss her injunction, be annulled and reversed; and that the cause be remanded to the District Court to be proceeded in according to law; the plaintiff paying the costs of this appeal.

Watterston and Greiner, for the plaintiff. Hoffman and H. D. Ogden, for the appellants.

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RICHARD T. CHRISTMAS, Tutor of William S. Weston and others, Minors, v. Isabella A. Fluker.

Proof of notice of protest directed to the legal representative of an endorser who had died before the maturity of the note, is insufficient to entitle the holder to recover in an action against the heir of the latter.

APPEAL from the District Court of East Feliciana, Johnson, J. This was an action against the heir of the endorser of a promissory note. It was proved, that the heir had been put in possession of the estate of her ancestor before the maturity of the note; but the notice of protest was directed only to the legal representative of the deceased. The plaintiff was nonsuited, and appealed.

- A. M. Dunn, for the appellant.
- Z. S. Lyons, for the defendant. The notice is bad. It should have been directed to the heir. Bailey on Bills, 287-8, and note a. Chitty on Bills, 529, and note k. Bank of Louisiana v. Smith, 4 Rob. 276.

MARTIN, J. The plaintiff is appellant from a judgment of nonsuit in favor of the defendant, sued as heir of the endorser of a promissory note. The irregularity of the notice was pleaded, and the plea sustained, we think correctly, by the First Judge. The notice was enclosed in a letter, not directed to the defendant by her name, but to the legal representative of her ancestor, the endorser.

Judgment affirmed.

GEORGE M'MICHAEL v. DAVID H. GILLISPIE.

The surety in a sequestration bond cannot be made responsible for any injury to the property sequestered, prior to the date of the bond.

APPEAL from the District Court of Livingston, Jones, J.

MARTIN, J. The defendant is appellant from a judgment on a sequestration bond, which he executed as surety of Weathersby,

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in a suit brought by the present plaintiff against the latter. The defendant admitted his execution of the bond; but averred, that the plaintiff had no claim on him, as no judgment was given against Weathersby, in the suit in which the property of the latter was sequestered; that there has been no breach of the condition of the bond; that the property sequestered was, without any judgment obtained or any order of the court for the restoration of the property sequestered, resumed by the plaintiff, under an agreement between him and Weathersby, to which the present defendant was not a party; and that, from the date of the sequestration bond and the subsequent delivery of the property to Weathersby until the resumption of it by the plaintiff, it suffered no injury or deterioration.

In an amended answer, the defendant urged, that the plaintiff acquired no right by the sequestration, because the writ on which the property was sequestered was illegally issued, there having been no order of court therefor.

The sequestration bond bears date the 3d of October, 1838. Several witnesses were sworn, who proved the killing of several hogs, the death of several oxen, and the felling of a number of trees, from whose testimony the jury inferred that the property sustained damage to the amount of \$400, for which the judgment appealed from was given.

The record shows that, in the month of October, 1839, a compromise was entered into by the plaintiff and Weathersby, which terminated without the participation of the present defendant, in the resumption of the sequestered property by the plaintiff, without any judgment having been obtained by the latter.

The counsel for the appellant has contended, that the plaintiff and appellee could only acquire a claim on his client by a judgment against Weathersby, in the suit in which the sequestration bond was given; while the adverse counsel has urged, that after the execution of the sequestration bond, the plaintiff acquired a claim for any injury or deterioration suffered by the property, inchoate, perhaps, and defeasible by a judgment in favor of Weathersby, but which became complete by the resumption of the property sequestered, with the consent of Weathersby. The conclusion to which we have come, as to the damages given by the

jury, renders it useless to pronounce any opinion on the point on which the counsel of the parties differ.

In their testimony in regard to the damage, not one of the witnesses shows any injury or deterioration, after the date of the sequestration bond. It is clear, that the appellant cannot be responsible for any injury or deterioration, between the original possession of Weathersby, and his dispossession under the writ of sequestration. The only witnesses who, for any period, state the injury or deterioration, fix it in the spring of 1838, or the summer of that year; while the sequestration bond was given in the autumn, i. e., on the 3d of October, 1838. No part of the testimony enables us to discover any injury or deterioration after that date. The verdict of the jury was, consequently, erroneous.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed; and that ours be for the defendant, with costs in both courts.

Watterston, for the plaintiff.
Sheafe and Penn, for the appellant.

ALBERT GALLATIN GILBERT and others, Heirs of Walker Gilbert, deceased, v. Philip Burg and others.

A judgment of nonsuit, or one rendered in a case in which the parties are not the the same, cannot support the plea of res judicats.

The accounts of the tutor must be settled, before any order can be obtained for the seizure and sale of property in the possession of a third person, subject to the general mortgage in favor of the minor; but a judgment in favor of the latter, rendered on an opposition made by him to a tableau of distribution presented by the curatrix of the deceased tutor, ordering the minor to be placed thereon as a creditor of the deceased for the amount claimed, and recognizing his mortgage, is a sufficient settlement.

APPEAL from the District Court of Baton Rouge, Johnson, J. Garland, J. The plaintiffs are the heirs of the late Walker Gilbert, whose succession was opened in the parish of Ascension, about the year 1818. Shortly after his decease, Lloyd Gilbert, a resident of the parish of East Baton Rouge, was appointed tutor of the plaintiffs, who were minors. He acted as such until his

death, in the year 1825, when Landry and Picou were appointed representatives of the minors.* The widow of Lloyd Gilbert administered upon his estate, which proved to be insolvent. ly after her appointment as curatrix, Landry and Picou cited her into the Court of Probates of the parish of Ascension, to render an account of the administration of Lloyd Gilbert, as the tutor of the plaintiffs. An account was rendered, and the case was tried. The Judge declared, that "having heard the parties interested in the rendition of the above account, the heirs of Walker Gilbert as well as the curatrix of Lloyd Gilbert's estate, represented by counsel, I have settled the liquidation of the said account as follows, viz: the half of the estate accruing to the heirs of Walker Gilbert at twenty-nine thousand six hundred and eighteen dollars, out of which sum there must be deducted the half of the debts allowed, amounting to seven thousand six hundred and seventy-nine dollars and sixty cents and a half; and it remains to be decided on the half of the account and vouchers laid over for further examination, amounting to six thousand seven hundred and seven dollars sixty-seven cents and a half." This was signed by the Judge, and dated the 12th September, 1825. thing more was done in the case until the 5th of April, 1827, when the attorney for the plaintiffs moved the court for leave to discontinue the suit, and it was granted, on the payment of costs by the plaintiffs. On the 27th of October, 1829, the plaintiffs in the aforesaid case took a rule on Mrs. Gilbert, the curatrix, to show cause why the above order of discontinuance should not be set aside, and why the court should not proceed to a final liquidation of the account of the minors, because said order was irregularly and inconsiderately granted, and was contrary to law, a judgment having been already rendered on part of the account. To this rule the curatrix answered, that the court had no power or authority in law now to do any act or thing, or to make any order touching the said judgment, which is final. It is denied that the discontinuance was contrary to law, or was improperly taken, it being the act of the plaintiffs, themselves. The rule was made



^{*} Landry was appointed tutor of one of the minors, and Picou curator ad litem of another.

absolute, and shortly after the court proceeded, without any further answer and in the absence of the curatrix, to a settlement and final liquidation of the account rendered by her; whereupon, after recapitulating the previous proceedings, a judgment was rendered on the 22d of March, 1830, fixing the balance due by the estate of Lloyd Gilbert to the minors for whom he was tutor, at the sum of \$21,445 37, with interest at five per cent from the 7th day of March, 1825, until paid.

Some time after the rendition of this judgment, the curatrix filed in the Probate Court of East Baton Rouge, where the succession of Lloyd Gilbert was opened, a tableau of the debts, stating their rank and privilege; and she prayed to be permitted and authorized to pay them. On this tableau the heirs of Walker Gilbert were not placed as creditors, in consequence of which, they opposed its homologation. On a final hearing, they were recognized as creditors, and ordered to be placed on the tableau for the sum above stated, with interest; and their general mortgage was recognized.

The petitioners set forth all these proceedings in detail; allege the receipt of large sums of money by their tutor; aver that the defendants are in possession of certain property owned by Lloyd Gilbert in his lifetime, on which their legal mortgage exists; and pray that it may be seized and sold to satisfy their demand.

The defendants answer, that this question has been decided by a judgment rendered in the case of the present plaintiffs against Nephler and Boyle. See 15 La. 59. Secondly, that the plaintiffs cannot recover against the respondents, without first having a regular settlement and liquidation of the accounts of the tutorship, which has never been done. They aver, that the judgment relied on, obtained in the Probate Court of Ascension, is illegal, irregular, and void, having been obtained without parties; and that the pretended judgment obtained in the court in Baton Rouge, has for its basis that above mentioned. They further answer, that the judgments were obtained by fraud and collusion; and allege that they have a right to contest them.

On the trial, the plaintiffs gave in evidence all the mortuary proceedings relating to Walker Gilbert's succession, comprising the inventory and sale, and many accounts and vouchers. They

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also produced the receipts of Lloyd Gilbert for large sums of money received on account of the minors, exceeding in amount the sum claimed as due. They exhibit the judgment of the Probate Court of East Baton Rouge, as well as that from Ascension; and show, that the property in question belonged to Lloyd Gilbert, while he was their tutor. There was a judgment in favor of the defendants,* and the plaintiffs have appealed.

The exception of the case having been heretofore adjudged in that of the present plaintiffs against Nephler and Boyle, reported in 15 La. 59, we think cannot prevail. The judgment in that case was one of dismissal or of nonsuit only; and cannot operate as a bar to another action. Besides this difficulty, the suit is not between the same parties, and the action is based on other grounds; although the object or judgment sought, be similar, perhaps the same.

It is very true, that the plaintiffs cannot recover against the defendants, without having their accounts against their tutors liquidated and ascertained. In the present case we think this has been done. The proceedings in the Probate Court of Ascension would not, in our opinion, be a sufficient liquidation and ascertainment of the amount, as we said in the case against Nephler and Boyle, 15 La. 59; but within a short time after these proceedings were completed, the plaintiffs again presented themselves to the Probate Court of East Baton Rouge, and, asserting that they were creditors, made opposition to a tableau or list of creditors presented by the curatrix of Lloyd Gilbert's succession. On the trial of this opposition, as we have before stated, the claim of the plaintiffs was recognized, and they were placed on the list or tableau for the amount claimed, their mortgage recognized, and the curatrix ordered to pay them. From this judgment she has never taken any appeal. If there had been any error or fraud in the proceedings in the Probate Court of Ascension, the curatrix had an opportunity of showing the fact. No such defence was then set up; or, if it were, it was overruled. 'The defendants' counsel insists, that the judgment of the Probate Court of Ascension formed the basis of that in East Baton Rouge,

^{*} The judgment was one of nonsuit.

which was a nullity. It is possible that such may have been the case; but, as we have not all the evidence before us on which the Judge of the latter court acted, we cannot say on what he based his judgment. We see the judgment, which has been in force for more than ten years, and we cannot disregard it. see no evidence of fraud and collusion in obtaining either of the judgments. On the contrary, when the curatrix was present at any trial, she resisted the plaintiffs' demand, and did not appeal from the final judgment to have it corrected or annulled, although duly notified thereof. Besides, the plaintiffs have shown by the mortuary proceedings in their ancestor's succession, and by other evidence, the receipt of large sums of money by Lloyd Gilbert, as their tutor. On the part of the defendants nothing is shown to rebut this testimony, or to raise any presumption of fraud, further than the irregular proceedings in the Probate Court of Ascension go to establish that fact. In those proceedings we do not see any thing fraudulent, although, we think, the reinstating the suit after it had for a long time been discontinued by the plaintiffs, was irregular and illegal, and does not confer any right on them. But other evidence being now given, making the case different from what it was in the instance of Nephler and Boyle, our judgment must be governed by it.

The judgment of the District Court is, therefore, annulled and reversed; and it is ordered and decreed, that the plaintiffs, Albert G. Gilbert and others, do have judgment in their favor; and that the defendants, Philip Burg and others, pay to them the sum claimed in their petition, to wit, the sum of eighteen thousand, nine hundred and seventy-seven dollars and sixty-two cents, with interest at five per cent, per annum, from the fourth day of September, 1837, until paid; or, that they surrender the property described in the petition, to be sold under the legal or tacit mortgage existing in favor of the plaintiffs, to pay said sum, with interest aforesaid. The defendants to pay the costs in both courts.

Duffel, for the appellants. Brunot, for the defendants.



GEORGE W. WATTERSTON v. ANTOINE JETCHE and another.

Plaintiff purchased from the heirs of an actual settler, a claim to a tract of land which had been recommended by the Register and Receiver for confirmation, and which was subsequently confirmed. In an action against the defendants, who set up no title, for a trespass committed before the title was confirmed:

Held, that plaintiff's title was sufficient to maintain an action against a mere trespasser.

Where one, through ignorance, commits a trespass on another's land, by cutting and removing timber, he will be responsible only for the actual value of the timber used or destroyed. *Per Curium:* The case is different, where one wilfully and knowingly commits a trespass on private property.

APPEAL from the District Court of East Baton Rouge, Johnson, J.

Watterston, pro se, cited Kernion v. Guenon, 7 Mart. N. S. 171. Peytavin v. Winter, 6 La. 559. Baillio v. Burney, 3 Rob. 317.

McKinney, for the appellants.

Garland, J. The plaintiff, alleges that he is the owner and possessor of a tract of land lying between the river Amité and the bayou Manchac, and that the defendants have committed various trespasses on it, by cutting and carrying away valuable timber, for which he asks two thousand dollars as damages. The defendants aver, that they are not indebted in any manner or sum to the plaintiff; that he is not the owner of the land on which the trespasses are alleged to have been committed, and never had possession of it, nor is entitled to possession thereof; and they deny, generally, all the allegations.

The petition was filed on the 20th July, 1842. On the trial, it was shown that the title to the land was confirmed to the author of the plaintiff's title, by an act of Congress passed fourteen days previously. The claim was recommended for confirmation in 1837, by the Register and Receiver, on proof of settlement and cultivation by one Ruckman, from the year 1790 to 1804. There is no proof of any actual occupancy by the original settler or the plaintiff, since the latter period. The plaintiff purchased the land of an heir of Ruckman, in February, 1840, by notarial act, for the sum of three hundred dollars; but he does

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not appear to have exercised any open acts of ownership over it, until the commencement of this suit. On the township map. made in the year 1830, and produced by the plaintiff as evidence. the land is represented as public. The surveyor who returned this map, says, that he always considered the land as belonging to the United States, and that when the defendants went on it to cut timber, he ran out the lines for them and told them it was public land. The neighbors considered it as public; and the person residing on the adjoining land had only heard of the plaintiff's claim, a short time before the commencement of this suit. It does not appear that any location or survey has ever been made of the claim. The evidence shows, that the defendants went on the land with a number of laborers, and cut a large quantity of oak timber, for the purpose of making staves. When the suit was commenced, there were between fifty and sixty thousand already made, and about twenty trees were cut down, which were afterwards made into staves by the defendants; but how many they made, is not shown. Some of the witnesses think the trees worth more than the soil; others think the soil more valuable. One witness says, that the value of a tree, suitable to make staves. is about fifty cents. When the staves are made, their value is about twenty dollars per thousand. How many trees were cut altogether is not shown. One witness says, that he sold the defendants timber, from his land, for one hundred dollars; and thinks the defendants cut double as much on the plaintiff's land as he (witness) sold to them.

Upon the evidence laid before them, the jury found a verdict in favor of the plaintiff for nine hundred dollars. The Judge refused the defendants a new trial, for which they had applied on the ground of the verdict's being against law and evidence, and the damages excessive; and he finally gave a judgment against them, from which this appeal has been taken.

We are of opinion, that the plaintiff has shown a sufficient title to the land, to enable him to maintain his action, as the defendants are trespassers, and do not themselves set up any title. The evidence also shows, that the plaintiff is entitled to damages; but we think the sum allowed by the jury excessive. The plaintiff gave only \$300 for the whole tract of 640 acres. It is not

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pretended that all the timber has been cut off of it; although, one witness says, that most of what was fit for staves has been cut. But that which remains, is, we suppose, worth something; and the land also has some value. The plaintiff possibly purchased it at a low price, as the title was not confirmed by Congress at the time. The defendants took away all the staves; and it appears that the jury allowed their full value to the plaintiff. This, we think wrong, as no allowance is made for the labor and expense of making the staves. The case is not one in which the plaintiff is entitled to vindictive damages. The defendants were, we believe, ignorant of his right to the land, and thought it public. They purchased trees from the known proprietor of a tract of land in the vicinity. They were mistaken in their supposition, and should, in justice, pay the value of the timber they used or destroyed, and for any injury the destruction of it has caused. This case is different from that of a party who wilfully and knowingly commits a trespass on private property; and we must reverse the judgment, and remand the case for a new trial.

It is, therefore, ordered, that the verdict be set aside, the judgment annulled and reversed, and the cause remanded for a new trial, to be proceeded in according to law; the plaintiff paying the costs of this appeal.

CAROLINE HEARSEY, Tutrix of her Minor Children, v. Napo-LEON BONAPARTE RIDDLE.

A purchaser of real estate, sued for the price, can only require security against the dauger of eviction, where he has reasonable ground for apprehending it.

APPEAL from the District Court of West Feliciana, Johnson, J. Ratliff, for the plaintiff.

Paterson, for the appellant.

GARLAND, J. The defendant is sued on his promissory note for \$898 33½, with ten per cent interest, per annum, and for the costs of protest. In his answer, he admits his signature, but alleges that there has been a failure of consideration. He avers, that

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the note was given to secure one of the payments of the price of a tract of land, which he purchased at the probate sale of the estate of James P. Hearsey; and that he has been disquieted in his possession of said land. He states, that two suits have been brought against him to recover a part or all of the land, one of which is still pending; and that he is afraid he will be again disquieted. He asks for a dismissal of the suit; but, in case of judgment, prays that the plaintiff may be compelled to give security, that he shall be indemnified in case of disquietude or eviction.

The plaintiff gave in evidence the note and protest: whereupon the defendant introduced the petition of Benjamin Williams and others against himself, which was filed in November, 1841, but to which no answer appears ever to have been made. With this paper are filed various documents, purporting to be the title papers under which Williams and others claim. In this petition, 275 acres of land are claimed, being part of a grant of one thousand arpents made to Pedro Robin Delogny, by Governor Gayoso, in January, 1799, of which, it is alleged, the defendant is in possession. documents show that there was a survey of a grant to Delogny. made by Don Carlos Trudeau. There is also a plat of a survey made by J. C. Kneeland, in 1810, of 275 acres of the aforesaid land. in connection with other tracts; but what right Williams and his co-plaintiffs have to this quantity, we are not informed. In the petition it is stated, that the ancestor of Williams and others, claims through Isaac Johnson, at whose probate sale he purchased; but Several witnesses were examined, who have no sale is produced. spoken about the Pine Bluff and Pinchy tracts of land, of their boundaries and various occupants; but none of them explain how the lands claimed by Williams and others interfere with the tract in possession of the defendant, purchased from Hearsev's estate.

The District Judge after hearing the parties and witnesses, gave a judgment for the plaintiff, from which the defendant prosecutes this appeal, as no security was ordered to be given. The defendant has not convinced us that the Judge erred. He has not shown a reasonable ground for apprehending an eviction from the premises sold to him.

Judgment affirmed.

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RELIGH C. SELF v. JOHN M. MORRIS.

A natural tutor is entitled to administer the property of his children without giving security, (C. C. 327, 330); but he cannot administer upon a succession opened in their favor, without having been appointed administrator, and giving security as any other individual. C. C. 1037. It is only after such an appointment that he can be considered as the representative of the succession, and be sued as such in the Court of Probates for the debts due by the estate.

As a succession opened in favor of minors can be accepted for them only with benefit of inventory, it cannot be said to be their property, and does not legally come into their possession, until it has been duly administered, when, whatever may remain after the payment of debts, will fall under the administration of their tutor. C. C. 1051. Arts. 327 and 330 of the Civil Code provide only for the administration of the separate and exclusive property of minors, in which no other person is interested.

When the heirs of a succession, being of age, have accepted it unconditionally, or, being minors, have come into possession of it as beneficiary heirs after the administration has legally terminated, they must be sued in courts of ordinary jurisdiction for any debts due by the succession. C. P. 996.

Where presumptive heirs remain in possession of an estate, without having accepted it or made an inventory, persons holding claims against it must cite them to declare whether they accept or renounce the succession. C. C. 1029. If they declare that they accept, or are silent, or make default, they shall be considered to have accepted as unconditional heirs, and may be sued as such, (C. C. 1030); but this provision does not apply to minors, who cannot accept an inheritance purely and simply. If the heirs of age declare that they wish to take the benefit of inventory, and to have delay for deliberating, or if the heirs are minors, who cannot accept otherwise, the judge must cause an inventory to be made, and appoint an administrator to manage the property. C. C. 1031, 1032, 1034 to 1040. The administrator thus appointed has the same powers, and is subject to the same duties and liabilities, as the curator of a vacant estate. C. C. 1042. C. P. 992, 994. If, after the expiration of the delay for deliberating, the heirs declare that they are not willing to accept the succession but with the benefit of inventory, the administrator shall proceed to liquidate and settle the affairs of the succession, and the balance, after the payment of the debts, will belong to the heirs. C. C. 1051.

Whenever a succession is accepted with benefit of inventory, and minors cannot accept in any other way, it must be administered as a vacant estate, under the authority of the Probate Court; and all claims against it must be sued for in that court, against the administrator appointed to settle it.

APPEAL from the Court of Probates of St. Helena, Leonard, J. Baylies, for the plaintiff.

Sheafe, for the appellant.

MORPHY, J. 'This suit was brought against John M. Morris,

as administrator of the estate of his deceased wife, Agnes, to recover the penalty of a bond entered into between her and Spencer M. Bankston, on the 3d of April, 1840, and by the latter assigned to the petitioner. By this instrument the deceased, separated in property from her husband, but by him duly assisted, bound herself to convey to Bankston and make him a title to two slaves. named Phillis and David, in consideration of the sum of four hundred dollars, which Bankston bound himself to pay to the branch of the Union Bank, at Covington, in this State, to the credit of the said Agnes Morris, or to pay a note, of which her husband, John M. Morris, was drawer, for four hundred dollars, on the 28th of May, 1840. In order to secure the execution of the above stipulations, the parties bound themselves to each other in the penal sum of \$800. After setting forth this bond. the petition avers, that it has become forfeited and due by a refusal, on the part of said Agnes Morris and her legal representatives, to comply with their contract, although Bankston has paid the sum of \$400, by taking up the note referred to in that instrument: and judgment is prayed for accordingly. denies the plaintiff's right of action against the defendant, as he has never been appointed administrator of his late wife's estate. and is in no way liable as such. It pleads the general issue, and avers, that the bond sued on was given for the individual debt of John M. Morris contracted before its execution, and that the deceased, his wife, was in no manner bound to pay the same. After issue was thus joined, the plaintiff moved for and obtained leave to amend his petition, by alleging that the defendant is administrator of his wife's succession by having been confirmed as natural tutor of her children, and having undertaken to manage the same as their tutor. There was a judgment rendered below against John M. Morris, as tutor of the minor children of Agnes Morris, for \$400, with legal interest from judicial demand. The defendant has appealed.

Our attention has been called to a bill of exceptions taken to the permission given by the Judge to amend the petition, after an exception and answer to it had been filed. The correctness of this opinion may well be doubted; but should we even grant the plaintiff the benefit of the amendment allowed, it could not assist Voy. VII.

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The fact of John M. Morris having been confirmed as the natural tutor of his children, could not, of itself, render him the legal administrator of his wife's succession. It only entitled him to a right of preference to such administration, over every other person who might claim it. A natural tutor has by law, a right to administer the property of his children, without giving any Civ. Code, arts. 327, 330. These articles, upon which the idea seems to be founded that tutors have a right, ex officio, to administer upon successions accruing to their wards. provide only for the administration of the separate and exclusive property of minors, in which no other persons than themselves have an interest; but when a succession opens in their favor, which under the law cannot be accepted for them except with the benefit of inventory, it cannot properly be said to be their property; and it does not legally come to their possession as beneficiary heirs, until it has been duly administered upon in due course of law. Whatever remains after the payment of the debts of the estate belongs to them, and falls under the administration of their tutor as such. Civ. Code, art. 1051. If there be no beneficiary heirs of age, and the tutor of the minors claims to be appointed administrator, he, like any other person, must give security, though he should be the father of such minors. 1037. It is only when the tutor has been thus appointed administrator, that he can be considered in law as the representative of the estate, and can be sued as such in the Court of Probates, for debts due by it. When the heirs of a succession, being of age. have accepted it unconditionally, or, being minors, have come into possession of it as beneficiary heirs, after the administration of it has legally terminated, they must be sued in the courts of ordinary jurisdiction, and judgments can be obtained against them for debts due by the succession. Code of Pract. art. 996. But when presumptive heirs remain in possession of an estate, without having accepted it, or made an inventory, the course to be pursued by persons holding claims against it is pointed out by article 1029 of the Civil Code. They must cite such heirs, in order to oblige them to declare whether they accept or renounce the succession. If the heirs thus cited, declare that they accept it, or are silent, or make default, they shall be con-

sidered as having accepted the succession as unconditional heirs, and may be sued as such. Art. 1030. But this provision does not apply to minors who cannot accept an inheritance purely and simply. If the heirs of age declare that they wish to take the benefit of inventory, and to have delay for deliberating, or if the heirs are minors who cannot accept otherwise, the Judge must cause an inventory to be made, and must appoint an administrator to manage the property. Arts. 1031, 1032, 1034 to 1040. The administrator thus chosen has the same powers, and is subject to the same duties and liabilities as the curators of vacant estates, and must proceed to the sale of the property and the payment of the debts in the same way. Civ. Code, art. 1042. Code of Pract. arts. 992, 994. If after the expiration of the delay allowed to the heirs to deliberate, they declare that they are not willing to accept the estate otherwise than with the benefit of inventory, the person appointed administrator, whether it be one of the beneficiary heirs or any other individual, shall proceed to settle and liquidate the affairs of the estate; and the balance remaining after the payment of the debts, shall belong to the heirs. Art. 1051. From all these provisions it clearly appears, that whenever a succession is accepted with the benefit of inventory. (and minors cannot accept otherwise,) it is to be administered as a vacant estate, under the authority of the Court of Probates: and that all claims against it must be brought in that court. against the administrator appointed to settle it; that the tutor of minors in whose favor a succession is opened, has not by virtue of his office, a better right to administer upon it, without being appointed and giving security, than any other individual; that persons holding claims against such an estate must provoke the appointment of an administrator, against whom, as the legal representative of such estate, they may bring their suits; and that they cannot sue the minor heirs, through their tutor, in the Court of Probates, and obtain against them personal judgments. Civ. Code, arts. 1031 to 1060. Code of Pract. arts. 974 to 996. La. 202. 5 La. 384. 17 La. 106. 1 Robinson, 407. 3 Robin-See also the case of Picou v. Dussuau et al. 4 Rob. 412. son, 30. It is, therefore, ordered, that the judgment of the Court of Pro-

bates of the parish of St. Helena, be reversed; and it is further ordered, that the defendant be dismissed, with costs in both courts.

PELEG SALSBURY v. WILLIAM D. RAY.

Appeal from the District Court of West Feliciana, Weems, J., presiding.

GARLAND, J. This suit was instituted to recover a tract of land, which the plaintiff claims under one Isaac Brown, to whom he pretends that it was confirmed by the United States, as a donation claim, by virtue of a settlement. It is described as having a front of sixteen acres on the Mississippi river, by a depth of forty, bounded on the upper side by a claim confirmed to Leoret. The petition contains the allegations usual in an action of this kind, and prays for a judgment for the 640 acres of land, and for dam-The defendant, after a general denial, states that he purchased the land he possesses of Joseph Purl, who warranted his title to be a good one. He prays, that his warrantor may be cited to defend him, but does not, in case of eviction, ask for a judgment against him. He also pleads the prescription of ten and twenty years in himself, and those under whom he claims. Purl filed his answer, in which he admits his sale and warranty to the defendant. He avers that he purchased the land of Pierre Leglise, late of the parish of Avoyelles, by an authentic act, in which his vendor warranted his title. He states that Leglise is dead, and that his heirs are absentees, not represented in the State. He prays that a curator, ad hoc, may be appointed to represent them, on whom service may be made, which was ordered; and he asks for a judgment against them, in case the defendant be evicted, and judgment obtained against him. He denies the allegations in the petition, and also pleads the prescription of ten years. The curator, ad hoc, of Leglise's heirs denies everything generally, and especially any warranty in the deed to Purl.

The plaintiff offered in evidence an abstract of a certificate of confirmation, in the "St. Helena Land District, No. 28, in favor

of Isaac Brown, for a section of land, situated in the parish of Feliciana. His own settlement claim." Dated 28th day of October, 1833. He also gave in evidence the copy of a certificate of confirmation of the above date, in which the Register and Receiver certify, in pursuance of an act of Congress, passed on the 8th of May, 1822, for the purpose of adjusting claims to land in the district east of the island of New Orleans, that Isaac Brown is entitled to a section of land in the parish of Feliciana, on which he resides, as an actual settler reported among the settlement claims. Several copies of an order of survey signed by the Register and Receiver, were then received, in which they state, that the improvement of Brown is on the east bank of the Mississippi, in Feliciana, and that as there is no confliction of boundary or conditional line, between Brown and any individual, it is ordered that the land be surveyed by beginning at the line of Leoret, on the river, thence running down sixteen acres for a front, and back forty acres, thence parallel with the front line up to Leoret's lower back corner, thence with his line to the place of beginning.

Under this order, a United States surveyor, named Dawson, in April, 1832, undertook to locate the claim; and, instead of following the directions given, he took an opposite course, and beginning at Leoret's lower corner on the river, ran out a line 122 chains and 73 links. For a back line, he ran on one course 36 chains, on another 34 chains, and then on a course different from the upper line 62 chains to the river, and with it to the place of beginning. In this way a front of nearly twenty-five acres was obtained on the river, instead of sixteen. None of the lines are parallel, though expressly ordered to be so. The superficial quantity is 636, acres; and the plat presents a figure of five unequal sides, showing a variety of angles, instead of a parallelo-This survey was approved by Surveyor General Williams, and appears to have been made in the manner it was, for the purpose of not conflicting with a claim in the rear, although the order of survey says that no confliction of boundary appears. The plaintiff then offered a sale from one Isaac Brown to himself. passed before a notary in the parish of West Feliciana, although both parties reside in Pointe Coupée, and as the evidence shows. at or about the same place. This sale is for \$1000 cash.

scribing the land, the sale states, that it "was confirmed to said Isaac Brown by act of Congress as an actual settler, proof of which is recorded at the St. Helena Land Office."

The plaintiff then offered Dawson, the surveyor, and a witness named Cook, to prove that the defendant was in possession of land covered by the Brown claim. These witnesses say, that they know where the lower corner of Leoret's tract is, and that the defendant has improved below it. Dawson says, that nearly the whole front of the Brown claim is in the possession of the defen-He describes it in his testimony as having a front of sixteen acres, although his survey makes it much more. He states that he surveyed the claims of both Leoret and Brown in the years 1827 and 1832, for the heirs of Leglise, conforming to the orders of survey, there being a change of location in the second survey. For this change we find no authority. When he first surveyed the Brown tract, a person named Miles was on it, claiming it to be public land. He says further, that he never saw Brown. He knew Leglise when he lived on the river, previous to 1820. The defendant resides on the Leoret place, but cultivates the other. Purl lived there before him.

The defendant produced a sale from Purl to himself, for 815 acres of land, bounded above by the land of Noles, and below by other lands sold by Purl. The consideration was \$12,225, part in cash, and the balance payable at different terms. The deed contains a clause of warranty. A sale from Leglise to Purl was also given in evidence, dated June 13th, 1835, and it also contains a general warranty. In this sale it is stated, that Leglise purchased in 1830 or 1831, by a notarial act, of the heirs of Marie Louise Colin, a free woman of color. No other deed, or written evidence of title, was produced by the defendant. The parol evidence they introduced shows, that Marie Louise, a free woman of color, was living on the land, or near it, as far back as 1809 or 1810. Leglise exercised acts of ownership over it. A witness who says he has known that neighborhood since the year 1806, states that he knew Isaac Brown in 1809, and had heard of him several years previously. "He was then called old Mr. Brown." He was killed between the years 1809 and 1812. He had two sons and one daughter, who left the place after their father's death. He says,

the old man may have had a son named Isaac; but that both the sons were boys smaller than witness, who, in 1809, was eighteen years old. He never heard of any Isaac Brown in that neighborhood, other than the old man just mentioned, who lived near where defendant's house now stands. After Brown's death some persons named Creswell, lived in the house for a year, more or less; they went away, and the house was then pulled down. The evidence of this witness is sustained in its important features, by others who have long been acquainted with the land and people near it. A witness named Barker says, that he has known the Isaac Brown, who is represented to have been the plaintiff's vendor, for about thirty years, and that they were boys together. Brown had no fixed place of residence, nor any family; nor did he ever settle on any land so far as this witness knows. vendor of the plaintiff is shown to have been apparently about forty years of age, in 1842.

Upon this testimony, the court below gave a judgment for the plaintiff, and ordered him to be put into possession, which order it appears has been executed. It was further decreed, that the demands of Rea against Purl, in warranty, and of the latter against Leglise's heirs, was not established; and that as to them there should be a judgment of nonsuit. From this judgment Purl has appealed, and cited all the other parties as appellees.

It will be recollected, that in the sale to the plaintiff it is stated. that his vendor was confirmed as an actual settler on the land. proof of which is of record in the Land Office. The certificate to Isaac Brown is for his own settlement claim. The law under which the certificate was issued, requires, to obtain such a confirmation, that there must be proof of actual habitation and cultivation, on or before the 15th of April, 1813. 1 Land Laws, 758-9, At that time, the evidence shows, that the vendor of the plaintiff was about twelve years of age, and it is difficult to believe that he was such an inhabitant and cultivator as the law contemplated. There cannot be a doubt, that the Isaac Brown who did actually live on the land in controversy, was dead as far back as 1812. It is not shown that the plaintiff's vendor is a son, or even a relative of that person. Had this vendor settled on the land and cultivated it previous to 1813, it is strange that no witHarbour v. Taylor and another.

ness should have known it. The plaintiff's counsel did not venture to put a question to any witness, relative to the settlement of his vendor on the premises. Upon a review of all the testimony, we are constrained to believe, that the vendor of the plaintiff is not the same Isaac Brown, to whom the confirmation was made by the United States, and consequently could not convey a title.

The omission of the plaintiff to give any testimony as to the indentity of his vendor is very remarkable, as he had notice that it would be contested, the cause having been once continued on the defendant's affidavit of his belief that he could produce such evidence. Interrogatories tending to elicit the facts were served on the plaintiff's counsel, to which he did not append any questions calculated to explain the great doubts existing.

The judgment of the District Court, is, therefore, annulled and reversed, and judgment rendered in favor of the defendants as in case of nonsuit; the plaintiff paying the costs in both courts.

Paterson, for the plaintiff.

Boyle and Ratliff, for the appellant.

PLEASANT H. HARBOUR v. H. P. TAYLOR and another.

Where a notary certifies in his protest that he demanded payment of a note at the place at which it was payable, though he does not state that he took the note with him or presented it for payment, it is sufficient. *Per Curiam*: The person making a presentment or demand must have with him the bill or note he is charged to collect; but the presumption is that the notary did his duty, until the contrary be shown.

APPEAL from the District Court of East Baton Reuge, Johnson, J.

Perin and Walker, for the plaintiff.

Avery, for the appellant.

MORPHY, J. The defendant Foreman, has taken a devolutive appeal from a judgment rendered against him, as endorser of a promissory note, drawn to his order by H. P. Taylor, and made payable at the office of discount and deposit of the Branch of the Louisiana Bank at Baton Rouge. He urges, that the judg-

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ment of the District Court is erroneous, as there is no evidence of the "presentment of the note, and demand of payment of it, at the place of payment, which are conditions precedent, indispensable to a recovery against the maker, and, a fortiori, in a suit against an endorser." The notary states in his protest, that, "at the request of P. H. Harbour, Esq., holder of the original promissory note, whereof a true copy is on the reverse hereof written," he went to the domicil therein specified, and demanded of the cashier of said bank payment thereof, who answered that he had no funds to pay it." &c. It is certain that the person making the presentment or demand, must have with him the bill or note he is charged with the collection of; but because both words are not used in the protest, it does not necessarily follow that the notary had not the note with him at the time. The presumption of law is, that the notary has done his duty until the contrary be shown; and from the whole tenor of the protest, it appears to us, that the note was produced and presented for payment, at the time and place therein specified. 15 La. 376. 16 La. 310. In the case of Warren v. Briscoe, reported in 12 La. 472, the notary certified, that "he went to the Planters' Bank of Mississippi, at Natchez, and was informed by the teller, there were no funds in the bank for the payment of said note, whereupon he protested," &c. From no part of the protest could it be inferred, that the notary took the note with him, and made either a presentment or demand of payment. That case is widely different from the present, in which, when the notary certifies that he demanded payment of the note at the domicil specified in it, we are bound to presume that he made such demand according to law.

Judgment affirmed.

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Harrell, Tutrix, v. Marston.

Cassandra Harrell, Tutrix of the Minor Heirs of Hezekiah Harrell, v. Henry Marston.

Plaintiff, the holder of a note, having received from the maker a draft on a parish treasurer, payable on a certain day, but accepted "payable when in funds," wrote a receipt on the back of the note, stating "that the draft when paid will be in full for its amount on the note." The draft had been accepted "payable when in funds," before its delivery to plaintiff, and both parties were aware that the parish treasury was insolvent, and that the time of payment would be uncertain. The draft was not protested at maturity, but was subsequently paid. There was no proof that the treasury was in funds before the note was paid: Held, that plaintiff was not bound to protest the draft, as there was no proof that the condition ever happened under which the acceptance was made; and that credit for the amount of the draft should be allowed only from the date of its actual payment.

APPEAL from the District Court of East Feliciana, Johnson, J. Muse and Merrick, for the plaintiff.

J. P. Bullard, for the appellant.

Morphy, J. This action is brought on a note executed in favor of the plaintiff by the defendant and Elias Boatner, in solido, for \$1500, payable on the 1st of January, 1837, with ten per cent interest from the 8th of June, 1836. On the back of the note is the following endorsement: "Received a draft upon the parish treasurer for \$1500, due on the first of June next, which has been accepted by the treasurer, and, when paid, will be in full for that amount on this note. March 14th, 1838." This draft, which had been drawn by Elias Boatner in favor of the plaintiff, was accepted by the parish treasurer of East Feliciana, in the following words, to wit: "Accepted, to be paid when in funds. March 14th, 1838;" and was paid on the 5th of April, 1841. The difficulty between these parties is in relation to the interest on the note, which the plaintiff claims up to the time the draft was actually paid; whilst it is contended by the defendant, that no interest is due from the 1st of June, 1838, when the draft matured, and when it must be presumed to have been paid, as it was neither protested, nor put in suit. Judgment was given below for the plaintiff, and the defendant has appealed.

The draft was not accepted absolutely, to be paid according to its tenor on the 1st of June, 1838; it was accepted by the trea-

Harrell, Tutrix, v. Marston.

surer, to be paid when in funds, and had, therefore, no fixed period of maturity. If any presumption of payment could result from the want of protest or suit, such presumption is rebutted by the positive evidence that no payment was actually made, until the 5th of April, 1841. It does not appear to us that the plaintiff was bound to protest the draft, as it is not shown that the condition under which the acceptance was made ever arrived, to wit: that there was in the parish treasury funds sufficient to pay the amount drawn on it. Both parties appear to have been aware of the insolvent state of the parish treasury. The draft or warrant had been accepted to be paid when in funds, before it was delivered to the plaintiff by Elias Boatner. She took it with this special acceptance, and gave credit for it on the back of the note, by stating that, "said draft, when paid, would be in full for that amount, on the note." The time when this amount would be paid was known to be uncertain. It is evident that the parties intended this order or warrant only as an assignment of the drawer's claim against the parish, to be credited on the note whenever it should be paid, and never contemplated any protest or suit against the parish. We can view it in no other light. It is not a bill of exchange, as it is not payable absolutely and at all events, at any given time. Bailey on Bills, 14. The evidence shows, that the parish treasury was very much indebted; that the plaintiff presented Boatner's order or warrant a number of times; and that at no period since it was given, was there a sufficiency of funds in the parish treasury to meet it. 'l'he warrant was paid on the 5th of April, 1841; but not with any funds in the treasury. It was taken up by one Robbins, a former collector, indebted to the parish, who gave it as money in payment of his debt. Under these circumstances, we think the Judge below decided correctly, in allowing credit for the draft only from the date of its actual payment; nor do we think that he erred in refusing to allow the defendant to ask a witness, whether the debt. in his opinion, could have been collected sooner, had the plaintiff brought suit against the Police Jury at the maturity of the obligation. Admitting that she could have sued the parish. under the terms of the acceptance, the answer of the witness would have expressed only his opinion as to the effect of such a

Dawson v. Dawson.

suit, and would have been, moreover, irrelevant testimony, not going to sustain defendant's plea of payment, or to show the fulfilment of the condition under which the warrant had been accepted.

Judgment affirmed.

LEVI DAWSON v. MARTHA DAWSON.

Defendant sued on a note which she alleged to be counterfeited, objected to its being produced in evidence by plaintiff, without his being first required to account for erasures and other defects apparent on its face. The court being unable to say whether there were such erasures and blemishes as should authorize the exclusion of the note till explained or accounted for, permitted the note to ge to the jury: Held, that the matter in controversy being specially within the province of the jury, the note was, under the circumstances, properly submitted to their consideration.

APPEAL from the District Court of East Feliciana, Johnson, J. Muse and Merrick, for the plaintiff.

Z. S. Lyons, for the appellant, contended, that the note sued on should not have been admitted in evidence until the erasures and interlineations were explained. McMicken v. Beauchamp, 2 La. 290. Slocomb v. Watkins, 1 Rob. 214. 1 Starkie, 328, 329.

Simon, J. The defendant, after a vain attempt to obtain a new trial, has appealed from a judgment rendered on the verdict of a jury, by which judgment she is condemned to pay the amount of three promissory notes, alleged to have been subscribed by her late husband, all payable to the order of the plaintiff, and filed with and made a part of plaintiff's petition.*

This suit was brought in March, 1840, and was put at issue on the 11th of April following, by the defendant's denial of the existence of the debt purporting to be due to the plaintiff from the deceased, of which the notes sued on are evidence. She says that

^{*} Defendant's liability resulted from having accepted the succession of her husband unconditionally.

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the whole crop of cotton of the year 1838, made by her husband, went into the plaintiff's hands; that the latter received the money; that the same has not been accounted for; and she requires that the plaintiff be ordered to produce the account of sales, &c. and that, if the balance be found against him, judgment may be rendered for the amount.

The notes sued on consist of one for \$500, dated 5th January, 1839; one of \$300, dated the 23d March, 1839; and another of \$100, dated 22d May, 1838. The original of the first of these notes, is brought up with the record, and reads thus: "Due Levi Dawson, or bearer, the sum of five hundred dollars, for value received of him, bearing ten per cent interest from date, until paid; this 5th January, 1839."

Two years after the filing of the first answer, (which had been filed by the defendant's attorney in fact, John C. White,) the defendant obtained leave to file an amended answer, admitting the two notes of \$100 and \$300, but alleging that, since the filing of her first answer, she had made such examinations and discoveries as induce her to believe, that the note of \$500 is false, fraudulent, forged and counterfeit. She, therefore, denies that the signature to that note was made and executed by her husband. An affidavit is annexed to this answer.

On the trial of the case before the jury, experts were appointed by the court, to examine and report on the genuineness of the note in controversy, but they could not agree. Witnesses were produced, one of whom testified that he could not say whether the signature to the \$500 note is that of William Dawson or not; and that it is not signed as he usually has signed notes when witness (who is the cashier of the Union Bank at Clinton,) has taken them. Another witness (John C. White, defendant's former attorney in fact,) said, that he had seen W. Dawson write; that he thinks the signature to the \$500 note is that of William Dawson; but that the body of the note is not in Dawson's hand-writing. Witness is a notary public, and has been so for a long time; he has had considerable opportunity of familiarizing himself with people's hand-writing; has seen Dawson write his name twice, perhaps a good many times; and passed two public acts for him.

After this evidence was given, the note was permitted to go to

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the jury, as having been sufficiently proven. But it is, perhaps, proper to remark, that no resort was had to a comparison of the signature with the authentic acts shown to exist by White's testimony, (Civ. Code, art. 2241.) and that the plaintiff's counsel having moved the court to appoint another set of experts to compare the disputed signature with the admitted signature of William Dawson on file, this motion was objected to by the defendant's counsel, who thereby succeeded in excluding this means of arriving at the truth.

Under the circumstances of the case, we cannot say that the jury, who heard the witnesses, who are acquainted with the parties, and who are better able to judge of their morality, and of the degree of credit to be put on the testimony, erred in deciding, that the note in controversy had really been executed by the deceased. The Judge, a quo, was also satisfied with the verdict. He refused to grant a new trial, and this being a mere question of fact, we have not been able to discover any reason why the verdict complained of should be disturbed.

With regard to the bill of exceptions taken by the defendant's counsel to the court's permitting the disputed note to be produced in evidence, without requiring the plaintiff to account for the blemishes, erasures, and other defects apparent on its face, the Judge, a quo, states, at the close of the bill, that "the court was unable to say whether there were such interlineations, erasures, or blemishes, apparent on the note, as to authorize its exclusion, till they were explained or accounted for. He thought it right to leave it for the consideration of the jury, and so charged." We have also examined the instrument brought up with the record; and we concur with the Judge, a quo, in the conclusion to which he came. It was the safest under the circumstances, as the matter in controversy was clearly and specially within the province of the jury.

Judgment affirmed.

The City Bank of New Orleans v. Denham.

THE CITY BANK OF NEW ORLEANS v. JOHN DENHAM.

Plaintiffs enjoined an order of seizure and sale taken out by a creditor by judicial mortgage against a lot of ground belonging to their debtor, and on which they claimed to have an anterior special mortgage. The lot mortgaged to plaintiffs was erroneously described as being lot 2 in square No. 9, instead of lot 2 in square No. 5; but it was proved that there was no square No. 9, and the description was, in other respects, sufficient to identify the lot; Held, that the error cannot affect plaintiffs' mortgage, it not having misled the defendant, whose right resulted from the recording of a judgment operating on all the property of the debtor. The certificate of a Recorder of Mortgages that no mortgage existed on a lot of ground offered for sale by a Sheriff, is entitled to no weight, in opposition to authentic evidence showing that a mortgage really existed on the property.

APPEAL from the District Court of East Baton Rouge, Johnson, J. The defendant appealed from a judgment perpetuating an injunction obtained by the plaintiffs.

Avery, for the plaintiffs.

Elam, for the appellant.

Bullard, J. The City Bank of New Orleans, alleging its ownership of a certain town lot in Baton Rouge, in that part of the town laid out by A. Gras, which lot is designated on the plan of the town as No. 2, in square No. 5, having sixty feet front on Church street, by one hundred and twenty feet in depth, made opposition to the order of seizure and sale obtained by Denham against said lot, and procured an injunction to stay his proceedings. The Bank represents, that the lot in question was mortgaged to them, to secure the reimbursement of a loan of money; that it was regularly seized and sold to satisfy the debt due to the Bank; and that the Bank became the purchaser.

The seizing creditor, Denham, answers, that if the Bank had acquired any right or title to lot No. 2, in square No. 5, in that part of the town laid out by A. Gras, by virtue of the alleged sheriff's sale made in virtue of an order of seizure and sale, at the suit of the plaintiffs against Amos Kent, they acquired the same, subject to the claim and special mortgage of the respondent for \$1124 24; that the plaintiffs never had any legal mortgage on lot No. 2, in square No. 5, adverse to the respondent; that lot No. 2, in square No. 5, had been seized at the suit of the re-



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spondent against Hardy Cain, under a judgment against Amos Kent & Co., and sold on the —— day of September, 1841, on a credit of one year; that, from the certificate of the Recorder of Mortgages, exhibited by the Sheriff, the plaintiffs in this suit had no privilege or special mortgage on lot No. 2, square No. 5, prior in date to the recorded judgment of the respondent.

In substance, the defence is, that in the mortgage to the Bank, the lot is described as No. 2, in square No. 9, instead of square No. 5, or, in other words, the identity of the lot with the one affected by the judicial mortgage of Denham, is denied; and, whether there be sufficient legal evidence of that identity, is the only question which the case presents.

In the mortgage given by Kent to the City Bank, the lot is described as No. 2, of square No. 9, measuring 60 feet front on Church street, by 120 in depth, in that part of the town of Baton Rouge laid out by A. Gras, being the same acquired by the said Kent from Joel Fulton, on the 23d day of April, 1838, by act passed before Charles W. Crawford, notary public for said parish. Now, it is shown, that there is no such square as No. 9, in that part of the town of Baton Rouge laid out by Gras. That part of the description is an impossible one, and was not calculated to mislead any one. If it were stricken out entirely, is not the lot otherwise sufficiently described? We think it is. It is No. 2, having a front of 60 feet on Church street. By recurring to the plan of that part of the town, in the office of the Parish Judge, it is found that there is but one lot No. 2 fronting on Church street, having a front of 60 feet, and that is in square No. 5. But the description does not end here. It is the same lot purchased of Fulton, by act before Crawford, of a particular date; and, on looking at that act, it is found to be No. 2, in square No. 5, instead of square No. 9, which has no existence. The defendant cannot complain that he has been misled by the erroneous description of the lot. His right, if any he has, arises from the recording of a judgment which operated equally upon all the real estate of Kent, and not from any conventional mortgage giving a correct description of the lot; nor is the certificate of the Recorder of Mortgages, that the Bank had no mortgage on lot No. 2, in square No. 5, entitled to any weight against the authentic

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evidence now before us, showing that the lot was described with sufficient certainty, and in a manner not calculated to mislead or deceive any one.

Judgment affirmed.

WILLIAM LANGFITT and others v. THE CLINTON AND PORT HUDSON RAILROAD COMPANY.

Where the appellants cannot be injured by the judgment of the lower court, it will be affirmed.

APPEAL from the District Court of East Felicians, Johnson, J. Lawson, for the appellants.

A. M. Dunn, contra.

GARLAND, J. This case has already been before us, and was remanded for a new trial. 2 Robinson, 217. In November, 1843, some time after the cause had been sent back, Langfitt and Perry, two of the plaintiffs, together with Saunders and Fluker, two of the commissioners appointed to liquidate the affairs of the Railroad Company, appeared in court, and filed an agreement as the basis of a compromise; in which it is said, that these two plaintiffs agree to receive in full satisfaction of the demand of Langfitt & Co., the sum of \$29,840 92, with ten per cent interest from the 22d June, 1840, and the further sum of \$1925 97; the said Langfitt and Perry to receive, in part payment, the notes of Perry in the hands of the commissioners, and also an amount due by Perry to the company on account; and also to receive one-fourth part of said sum in the demands of the company against Elias W. Boatner; and it is further agreed, that the mortgage or privilege of the plaintiffs, as contractors, is not to be affected until the debt owing them is paid. The parties pray, that notice may be given of this compromise; and if no opposition be made within ten days, that it be homologated, and made the judgment of the court. Before the expiration of the ten days, the administrator of Elias W. Boatner presented an opposition:

1. Because his intestate was one of the firm of Langfitt & Co., Vol. VII. 6

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and the opponent was and is a party to the suit in which it is proposed to make this compromise, to which he has not been made a party, though he has an interest. He contends that, without his concurrence, forced or voluntary, no decree can have any binding effect on the parties.

- 2. Because the commissioners have no right to agree, that the entire balance due by the Railroad Company to Langfitt & Co., shall be paid to Langfitt & Perry, when there is a third party interested, who, as a joint undertaker or contractor, is entitled to receive his virile portion of what remains due, or to have it compensated and discharged by the obligations of the said party, in the possession of the Railroad Company, or their legal assignees.
- 3. Because the said commissioners have no authority to compromise or settle the amount owing to each of the joint contractors, otherwise than by a direct payment to each of his virile portion, or by extinguishing it by compensating the liabilities of each without regard to any account or unsettled obligations between the co-contractors themselves.
- 4. Because one of the issues made, tried and determined in the suit pending, was whether the virile portion of E. W. Boatner, as one of the contractors with his co-plaintiffs, in the demand on the company, be compensated and discharged by the notes and liabilities of said Boatner held by the company, the evidence of which liabilities is on file, and on which a judgment has been rendered, which has the effect of a thing adjudged, and by which all parties are bound; and this he contends applies as well to future liabilities as to the present. He, therefore, prays, that the compromise may be rejected, or so amended as to declare the amount due by said E. W. Boatner to the company, compensated and discharged by his virile share under the contract; and that any future liabilities may be also so discharged.

On the day that this opposition was filed, Reddin Brown and John L. De Lee, who say that they are the endorsers of a note drawn by E. W. Boatner and held by the Railroad Company, on which a judgment has been rendered against them, intervened in the case, and also made opposition, alleging that they are interested in not having the compromise affirmed. They make the same objections to it as the administrator of Boatner.

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After hearing the parties, the court below authorized and decreed the commissioners of the Railroad Company to compromise with Langfitt and Perry, and to pay them three-fourths of the sum of \$29,840 92, with ten per cent interest from 1st June, 1840, and also three-fourths of the sum of \$1925 97. of Perry, in the hands of the commissioners, and the balance of the account due by him, to be received in payment as agreed upon. The remaining fourth of the above sums to remain unsettled; with the understanding, that the compromise and the judgment authorizing it to be made, are not in any manner to operate to the prejudice of the estate of E. W. Boatner, of the securities of said Boatner, or of Langfitt and Perry, in the disposition which may hereafter be made of the remaining fourth above stated. was further ordered, that the mortgage or privilege which Langfitt and Perry may have on the railroad, be preserved to them, until their demand be fully paid. From this judgment Brown and De Lee, the intervenors, have alone appealed.

The record does not contain the proceedings or judgment against the intervenors, mentioned by them; but their allegation of its existence and character appears not to have been denied in the argument. We have considered its effect, so far as we can comprehend it, from the brief statement before us. It may be somewhat doubtful whether these intervenors, having failed to set up the plea in compensation now claimed in the suit brought against them on the note they endorsed, can now do so; but it is not necessary to investigate that question now. We have looked attentively to see in what way the appellants can be injured by the judgment as it stands; and that examination satisfies us, that they have no particular interest to be affected. There is a reservation of the rights of the several parties, whenever they may come up for investigation.

Judgment affirmed.

Noble v. Cooper.

WILLIAM NOBLE v. JAMES COOPER.

To support the plea of res judicata the cause of action must be the same in the two suits.

The omission to register a mortgage, cannot be taken advantage of by a purchaser of the mortgaged preperty, who assumed the payment of the debt secured by mortgage as part of the price.

APPEAL from the District Court of East Baton Rouge, Johnson, J.

Avery and M. Morgan, for the plaintiff.

Elam, for the appellant.

Morphy, J. The petitioner, the holder of a note of \$700. drawn by Thomas Ballew to the order of and endorsed by Francis Nephler and A. G. Mangrum, and secured by mortgage on two lots of ground in the town of Baton Rouge, seeks to recover of the defendant the sum of \$578, which he alleges that the latter assumed to pay on the said note of \$700, as a part of the price for which he purchased the said two lots of ground from Thomas Ballew. The petitioner avers that, in the act of sale of this piece of property from Ballew to the defendant, there was an error in the description of the note of his vendor in favor of Nephler and Mangrum as to its amount, and that said note, upon which the defendant agreed to pay the sum of \$578, was for \$700, instead of \$500, as is manifest from the act of mortgage from Ballew to Nephler and Mangrum, bearing date the 6th September, 1838, which is specially referred to in the act of sale to the defendant. Petitioner further alleges that, although the defendant knows and has admitted that the plaintiff is the legal owner of the debt assumed, he yet refuses to pay the said sum of \$578 on the said note of \$700, which is protested and unpaid. The petition concludes by praying for judgment for the said amount with interest from judicial demand, and for the seizure and sale of the mortgaged lots to satisfy such judgment. The defendant pleaded the general issue, specially denying his liability, either personally or by mortgage, to pay any portion of the note of \$700 held by the plaintiffs; and setting up the plea of res judicata to any claim the plaintiff ever had against the two lots of ground in his posNoble v. Cooper.

session, under the assignment to him by Nephler and Mangrum of Ballew's note and mortgage for \$700. There was a judgment below in favor of the plaintiff, and the defendant has appealed.

The evidence fully satisfies us, as it did the inferior Judge, that but one note existed, secured by a mortgage on the property sold to the defendant, and that there was an error committed by the notary who drew up the act of sale, in describing the note due by Ballew to Nephler and Mangrum, and on which the defendant assumed to pay \$578, as being for the sum of \$500 instead of \$700, its true amount, as shown by the act of mortgage of the 6th of September, 1838, to which the sale specially refers.

To support his plea of res judicata, the defendant introduced the record of an hypothecary suit brought against him, as third possessor on the note or mortgage held by the plaintiff, and in which an injunction he had taken out was made perpetual, on the ground, that the mortgage sought to be enforced against him. had never been recorded in the parish of East Baton Rouge, where the lots were situated. The Judge properly disregarded this plea. In the first action, the defendant was sued as a third possessor, for the whole amount of the note of \$700, transferred to the plaintiff by Nephler and Mangrum. In the present case, he is sought to be made liable on his assumption to pay \$578 on the debt of his vendor. The cause of action is different in the two suits. It is not eadem causa petendi. Pothier, Oblig. 288. The decree perpetuating the injunction only sustained the exception of want of registry, which cannot be pleaded in this action, the defendant having assumed to pay the debt for which he is sued; and having, therefore, full knowledge of the mortgage by which it was secured.

Judgment affirmed.

Succession of James Williams—David Thomas, Administrator, Appellant.

Any creditor of a succession administered under the supervision of a Court of Probates, may, at any time, compel the administrator to render a full and perfect account showing the true situation of the succession, and to make a distribution of the funds in his hands, according to a tableau of distribution, to be homologated by the court, after due notice to all the creditors. C. C. 1156 to 1153, 1167 to 1170.

C. P. 1053 to 1055. Act 13 March, 1837, § 6, 7.

An account rendered by an administrator of a succession cannot be homologated ex parts. It must be submitted to the court contradictorily with all the creditors. An administrator is entitled to credit for payments made by him to creditors of the succession, though without authority from the Court of Probates, where the sums paid do not exceed the amounts which the creditors were entitled to receive.

APPEAL from the Court of Probates of West Feliciana, Weems, J.

Simon, J. The appellant, as administrator of the estate of Williams, having filed in the Court of Probates an account entitled, "Account of David Thomas, Administrator of Capt. James Williams, deceased, late of the parish of West Feliciana," made application to said court, by petition, praying that the account might be homologated. This account exhibits certain disbursements made on account of the succession, for which the administrator claims credit; and shows, that the estate has several outstanding claims yet uncollected. It alludes to several other debts due by the succession, without giving any detailed statement thereof, and concludes by stating that, as soon as the applicant can receive the sums due, he expects to file his tableau of distribution.

Opposition was made to this account by Charles M'Micken, one of the creditors of the succession, (see 1 Robinson, 393,) on several grounds, to wit; 1st. That it does not call together all the creditors, in order that their claims may be acted upon concurrently. 2d. That it does not distribute, pro rata, the funds on hand. 3d. That it does not classify the creditors. 4th. That it purports to have given undue preference to a part of the creditors, by payments made to them unduly, and without legal authority. 5th. That the opponent's demand should have been

paid, or put with all the creditors upon a tableau of distribution, to be paid concurrently with them. The opposition concludes by praying that the account filed may be rejected, and by requiring that the administrator be ordered to exhibit his bank book, and show the amount of money in his hands belonging to the estate, and to file an account in due form, distributing the same amongst all the creditors, &c.

The inferior court rendered judgment, rejecting the account filed, and ordering the administrator to file a tableau of distribution of the funds of the estate on the third Monday of March following, (1843,) to exhibit his bank book, and to account for the moneys by him collected. From this judgment, the administrator has appealed.

It was shown on the trial, by divers receipts and other vouchers, that the payments made by the administrator, some of which were authorized by the Judge of Probates, so far only as to approve the legitimacy of the claims, but without any special order to the administrator to pay them, were really made; but the account filed does not contain any list of the other creditors, or of the amounts due them respectively: does not exhibit any active or passive debts of the estate, except certain statements of claims due by and to the succession; and does not in any manner show the real situation of the affairs of the succession.

It is perfectly clear that, except as to certain privileged debts, excepted by law, the curator or administrator of a succession cannot pay the debts thereof but in the manner prescribed by law, which is, by applying to the Court of Probates, if he have sufficient funds to pay all the creditors, to be authorized to pay them, according to a statement mentioning the names and places of residence of the creditors, and the several sums due to each; or, in case of insufficiency in the funds, by filing a tableau of distribution of said funds among the creditors, according to the order of their privileges and mortgages, or by contribution among the ordinary creditors, with a prayer to be authorized to pay them according to the tableau. Civ. Code, arts. 1056, 1057, 1058, 1167, 1168, 1169, 1170. Code of Pract. arts. 1053, 1054, 1055. None of these formalities appear to have been complied with in this case, previous to the administrator's making

the payments mentioned in his incomplete account, or provisional tableau.

Under the provisions of an act of the legislature of the 13th of March, 1837, (Bul. & Cur. Dig. 3, § 6, 7,) any creditor of a succession is allowed to file a motion to know whether the executor, administrator or curator, has any funds: and the latter is bound within ten days, to file a true statement of his account with the bank, (wherein the funds are to be deposited, according to the preceding section,) showing the amount of funds collected by him, &c. And it is made the duty of such administrators to render, at least once every twelve months, to the Probate Court, a full, fair and perfect account of their administration, &c., under certain penalties specified in the act.

Taking this law in connection with the articles above referred to, it is manifest, that the intention of the legislature was to give to each of the creditors of successions administered under the supervision of the Courts of Probates, the right of compelling the administrators, not only to show the true situation of the said successions, but also to make a distribution of the funds on hand among the creditors, nay, to pay the debts thereof according to a tableau of distribution presented, after due notice to the creditors, for the homologation of the court. The terms of the first section of the act are positive, that, on no account, shall the administrator remove or withdraw the funds deposited, or any part thereof, until such tableau of distribution is homologated, or unless said administrator be ordered by a competent court, and then only to pay such debts as may be ordered for payment.

Here, the account filed by the administrator shows that, (except as to a few privileged debts,) certain sums were withdrawn from the mass to pay debts subject to classification, and that those debts were not paid in the manner prescribed by law. This the administrator had no right to do; and the opposing creditor, whose liquidated claim is not even mentioned in the account, has clearly a right to complain, and to demand that the administrator should be ordered to exhibit his bank book, to show the amount of money in his hands, and to file an account, in due form, distributing the same among the creditors. Again, this application may be made by any one of the creditors, at any time,

and the administrator is bound to comply with the order of the court granted to that effect; and, when funds are to be distributed according to a tableau, or whenever the administrator renders his account, which, according to the terms of the law, must be full, fair and perfect, it is necessary that all the creditors should be duly notified. This was not done in this case.

It has been urged, that the account under consideration, is simply an exhibit of what the administrator has done during his administration, filed according to the sixth section of the law above referred to, and that it does not purport to be a tableau of distribution. It is clear, that it is not a tableau of distribution, since no division of the funds is made between the creditors; but it is equally clear, that it is not made in conformity with the law, as it does not exhibit the exact situation of the estate. Such an account, when rendered, must be submitted to the Probate Court contradictorily with all the creditors, and cannot be homologated ex parte.

We must, therefore, conclude, that the account in dispute cannot be homologated, and that it is the duty of the appellant to comply with the judgment appealed from, within such reasonable time as may be fixed by the court, a qua, after the present judgment shall have been returned to the lower court for execution. We think proper further to remark that, as no improper conduct is charged in the opposition against the administrator, who, so far, appears to have misunderstood the provisions of the law of 1837; and as the prayer made by the appellee in his opposition. is based on the supposition that a bank book was duly kept by the administrator, who is only called on to show the amount of money in his hands belonging to the estate, and to distribute the same among the creditors according to law, we understand that the rejection of the informal account by him filed, shall not preclude him from carrying the sums (by him paid) due to the creditors therein named, on the tableau of distribution to be filed, nor from classing them therein according to their rank, without any regard to the payments heretofore made, except as to the privileged debts, which are to be paid in preserence to all others.

It is, therefore, ordered and decreed that the judgment of the Probate Court be affirmed, with costs; and that this case be re-Vol. VII.

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manded to the lower court for further proceedings according to law.

Muse and Meyrick, for the appellant.

C. M. Randall, contra.

OCTAVINE AUBIC v. WILLIAM GIL.

Where, in an action by a minor against her tutor, plaintiff prays that the latter may be ordered to render an account, and to pay her a certain sum, or whatever amount may be found due by him, and defendant renders no account, the plaintiff may prove any sum received by him. C. P. 998. Per Curiam: the rule that a general allegation of a party being indebted in a gross sum, without any specification of the time, place or manner in which the sum accrued, is too vague to authorize the admission of proof, the object of which is to prevent the defendant from being taken by surprise, is inapplicable to the case of a tutor called upon to account, who knows what is asked of him; his ward is under no obligation to state the time, place and manner of receiving the sums for which he is accountable.

In rendering judgment in an action by a minor against her tutor for a settlement of the tutorship, the commissions of the latter should be allowed though not expressly claimed.

A minor is entitled to legal interest on the amount ascertained to be due to her by her tutor, from the date of the judgment ascertaining the amount so due. C. C. 353.

APPEAL from the Court of Probates of East Baton Rouge, Tessier, J.

G. S. Lacey, for the plaintiff.

Elam, for the appellant.

MORPHY, J. This is an action brought against the defendant by his ward, to compel him to render an account of his administration. She alleges that, as her tutor, he has received large sums of money from the succession of her grandfather, Andrus Gil, and from other sources, and particularly a sum of about five hundred dollars paid over to him by the Probate Judge of the parish of East Baton Rouge, and derived from the said Andrus Gil's estate. She further represents that, although often requested, he has never rendered any account of his tutorship, and refuses to pay over the moneys belonging to her in his hands. She prays, that

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he may be ordered to render his account as her tutor, and that he may be adjudged to pay her the sum of five hundred dollars, or whatever may be found due to her, with five per cent interest thereon, &c. The defendant excepted to the petition as not containing a clear and concise statement of the object of the demand; but the inferior Judge having overruled this exception and ordered him to give in his account within a delay of twenty days, he filed an answer, in which he admits that he was appointed tutor to the petitioner, and, as such, administered to her wants, but he denies that he ever received for her any sum of money from the succession of Andrus Gil, or that any such succession was ever opened in the parish of East Baton Rouge; and he further denies that he has anything to account for on her demand. This answer, which seems to have been received and treated below as an account, was excepted to by the petitioner as too vague and indefinite; and by way of opposition to it she sets forth various sums which she alleges had been received by her tutor, being the proceeds of cattle sold, and the value of personal property belonging to her, by him appropriated to his own use; and states, that the \$500 paid to the defendant by the Probate Judge of East Baton Rouge, were derived from the succession of her grandmother, Suzanne Vacherez, the deceased wife of Andrus Gil, and not from the estate of the latter as alleged in her petition. The Judge below rendered a judgment in her favor for \$518, with costs. The defendant has appealed.

The evidence adduced by the plaintiff fully sustains the judgment appealed from; but it is urged, that under the averments of the petition the Judge improperly received it, and we are referred to the case of Pargoud v. Guice, Administrator, 6 La. 77, in which this court held, that a general allegation of a party being indebted in a gross sum, without any specification of the time, place or manner in which the sum claimed accrued, is too vague to authorize the admission of proof in support of it. The rule thus laid down, which is one well settled in our practice, is inapplicable to a case like the present. Its object is to apprize the opposite party of what is demanded of him, that he may not be taken by surprise; but when a tutor is called upon to render his account, he knows exactly what is asked of him; his ward is un-

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der no obligation to state the time, place, and manner, in which he may have received the sums he is accountable for. Under article 998 of the Code of Practice, the minor may pray that his tutor he decreed to give an account of his administration, or to pay such sum as he may suppose to be due. If the tutor render an account, it is open to every objection the minor may make, by reason of any errors or omissions in it to his prejudice; but where as in this case, the tutor renders no account, the minor may prove any sum which has been received by him. A tutor called upon to account, should not be permitted to avail himself of his ward's want of information in relation to his rights; and he cannot require of him that strictness in pleading which may be exacted from ordinary suitors. The course pursued by the defendant, in this case, was disingenuous. He was well aware that the \$500 he had received from the Probate Judge, was derived from the succession of his pupil's grandmother; and the Judge, in our opinion, properly admitted the evidence adduced by the plaintiff in support of her claim, especially after she had in her supplemental petition, corrected the erroneous statement she first made. We have been requested by the appellee to amend the judgment appealed from, by rejecting the commissions allowed to the defendant, and granting her interest from its date. We do not think that the Judge erred in allowing to the defendant his commission, although he did not expressly claim any. It was a deduction to which he was entitled in the settlement of the balance he was decreed to pay to his ward; but the latter was clearly entitled to legal interest, from the date of the judgment liquidating such balance. Civ. Code, art. 353.

It is, therefore, ordered, that the judgment of the Court of Probates of the parish of East Baton Rouge, be so amended, as to bear legal interest from the 24th of November, 1843; and that it be affirmed, in all other respects, with costs.

McMichael v. Davidson.

WILLIAM McMichael v. Thomas Green Davidson.

Where an authentic act of sale contains an absolute assumption by the purchaser of a debt due by the vendor to a third person, a paper, signed by the vendor, declaring that the assumption was not an absolute one, will be inadmissible against such third person to disprove the absolute character of the assumption, unless the fact be sworn to.

Where the real date of an act sous seing privé is not proved aliunde, it will date, as to third persons, only from the day of its production in court.

Defendant, an attorney at law, having recovered a judgment for the plaintiff, subsequently purchased certain slaves from the debtor, and in part payment, assumed the debt due by the latter to his client. In an action by the client to enforce payment of the debt assumed, and defence that plaintiff had never notified defendant of his acceptance of the assumption: Held, that the attorney was bound to hold on to any advantage he had acquired for his client, and to notify him thereof immediately; and that the relation existing between the parties bound the attorney to comply with his assumption, without waiting for the acceptance of his client, and notice thereof.

APPEAL from the District Court of Livingston, Jones, J.

A. Hennen, for the appellant. This action is founded on art. 35 of the Code of Practice, and on arts. 1884, 1896 of the Civil Code. Marigny v. Remy. 3 Mart. N. S. 607. Duchampard v. Nicholson, 2 Mart. N. S. 672. Flower v. Lane, 6 Mart. N. S. 152. Pemberton v. Zacharie, 5 La. 316. Code of 1808, art. 21, p. 262. An act sous seing privé, the date of which is not proved aliunde, has no date, as to third persons, but that of its production in court. Phillips v. Stanley, 1 La. 247. Thomas v. Callichan's Heirs, 6 Mart. N. S. 332. Doubrère v. Grillier's Syndic, 2 Mart. N. S. 171. The parties to the authentic act by which the payment was assumed, could not change its provisions to the prejudice of third persons. Nemo potest mutare consilium suum in alterius injuriam. L. 75, De reg. juris.

Penn, for the defendant.

MARTIN, J. On the 3d of February, 1840, the defendant, as the plaintiff's attorney, obtained a judgment against Sharbert, and, on the 17th March, 1841, purchased from the latter two slaves, in discharge of the price of which he assumed several debts of his vendor, and particularly that on which judgment had been obtained in the preceding year. On the 22d of July,

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1842, an execution on that judgment was issued, and levied on a tract of land, the sale of which was stayed by the plaintiff in a letter to the Sheriff, in which he expresses an opinion that the debt was due by the present defendant, and that he would be able to make it appear so. Shortly after, the present suit was brought, in order to obtain from the defendant the amount of Sharbert's judgment, under the stipulation in favor of plaintiff in the act of the 17th March, 1841.

The defendant pleaded the general issue, and admitted that he had received Sharbert's note from the plaintiff for collection; that he had brought suit thereon, and obtained a judgment; but averred, that he was unable to coerce payment. He alleged, that on his purchase of two slaves from Sharbert, several debts of the latter, including the plaintiff's judgment, were enumerated as designed to be paid by the defendant out of the price of the slaves; but that Sharbert reserved to himself the right of pointing out which of them should be paid, in case the total amount exceeded the price of the slaves; that he afterwards directed the defendant to pay part of these notes, equal in amount to the price of the slaves, without including among them the plaintiff's judgment, which was done by the defendant, who took his receipt therefor on the 17th of August, 1842. That on the 22d of July, 1842, the defendant, finding that there would not be money in his hands to pay the defendant's judgment, took out execution thereon, which was levied on a tract of land, the sale of which was stayed by the plaintiff. The respondent concludes by demanding \$50 in reconvention, for his fee in the plaintiff's suit against Sharbert.

The District Court rejected the plaintiff's claim, and gave judgment against him for \$30 on the reconvention; and he has appealed.

The deed of sale for the slaves, contains an absolute assumption of the plaintiff's judgment against Sharbert, by the defendant. With the view of showing that the assumption was of a different character, the defendant's counsel offered a paper subscribed by Sharbert, in which he states, that at the time of the sale of the slaves, it was thought the price would suffice to pay all the debts enumerated, but that this was found afterwards to

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be otherwise; that he directed the desendant to leave the judgment unsettled; and that desendant thereupon paid over the whole price under Sharbert's directions. This paper bears date the 17th of August, 1842. The reading of it in evidence was objected to, on the ground that, having been given by a third party, it is irrelevant and cannot be opposed to the plaintiff. Unless the fact be sworn to, it could not be admitted to disprove the absolute character of the desendant's assumption, in the sale of the slaves by an authentic act. Indeed, none of the facts stated in the paper under consideration, go so far as to support the allegation that the assumption was a qualified one. The paper, perhaps, proves the payment of the whole price of the slaves, it being the vendor's receipt; but being sous seing privé, and its date not having been proved aliunde, it has none but the day of its production in court.

The plaintiff's letter to the Sheriff having been read without opposition, is evidence of his acceptance of the defendant's assumption. But it is contended on his part, that this acceptance was never notified to the defendant, until he had been discharged by the payment of the whole price of the slaves. He was notified of the plaintiff's acceptance by the inception of the suit, if he was not otherwise before; and, as the date of the act sous seing privé between himself and the plaintiff, must be that of its production in court, there is no evidence of the payment of the price before notice to the defendant of the plaintiff's acceptance, which is in evidence in the plaintiff's letter to the Sheriff, bearing date three days before the day on which the defendant alleges that he paid the price.

Until now we have considered the plaintiff and defendant as standing in no particular relation to each other; but that of client and attorney, existed between them. The attorney owing fidelity to the client, was bound to hold on to any advantage he had acquired for the latter, and could not gratuitously part therewith. The plaintiff's claim on Sharbert was a precarious one. Judgment had been obtained on it for upwards of a twelve month, without the collection of any part of it, although the debt was small, i. e. less than \$300, when by the assumption of the debt it became safe. It was the duty of the latter immediately to in-

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form his client of the advantage thus gained, and the best way in which this could have been done, was by the payment of the judgment. It appears that this was not only neglected, but that the defendant manifested his determination to deprive his client of the advantage he had gained for him, and that he forced him to institute the present suit. The relation in which the parties stood, bound the defendant to comply with his assumption, without waiting for the acceptance of the client, and notice thereof.

The District Court, in our opinion, erred. It is, therefore, ordered and decreed, that its judgment be annulled and reversed; and that the plaintiff recover from the defendant the sum of \$269 76, with ten per cent interest from the 21st of May, 1839, till paid, the amount of the plaintiff's judgment against Sharbert, and the costs of the suit in which it was obtained, (deducting therefrom the sum of \$30, which, in our opinion, was properly allowed below on the reconvention,) with the costs of the suit in both courts.

RAPHAEL DAVIS v. JOHN SINGLETON.

The decision of a court of the first instance refusing a new trial, will not be reversed unless clearly erroneous.

APPEAL from the District Court of East Feliciana, Johnson, J. J. P. Bullard, for the plaintiff.

Lawson, for the appellant.

MORPHY, J. A verdict and judgment having been rendered below against the defendant, he moved for a new trial on the ground of newly discovered evidence. This motion was overruled, and he has appealed.

The evidence sworn to have been discovered by the defendant since the trial of his case, is, that two of the witnesses whose testimony went to the jury, to wit, Lewis Carpenter and Sarah Cook, were inimical to him, and that they were not worthy of belief under oath. In support of his motion, the defendant offered the affidavits of two persons, who state, in substance, that they have

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always known Lewis Carpenter and Sarah Cook as bad characters; that they have good reason to believe that these individuals are inimical to the defendant; that, in their opinion, they are not to be depended on as to honesty and veracity, and that they would not believe them under oath, when prejudiced and unfriendly towards a person, &c.

Applications of this kind are always addressed to the sound discretion of the inferior courts, who properly receive them with great caution. Unless their decision be clearly erroneous, we have often said that we will not interfere. This suit was tried in April, 1843, and the testimony of the persons said to be unworthy of belief, was taken in the months of April and June, 1839. They were living in the neighborhood of the defendant; and yet no attempt to invalidate their testimony was made on the trial. It is difficult to believe that, with ordinary diligence, the defendant could not have discovered, from June, 1839, to April, 1843, the evidence which he brought forward so shortly after the trial. From the record we are also induced to believe, that the Judge may have been satisfied that, even without the testimony of Carpenter and Sarah Cook, there was sufficient evidence to support the verdict, and justice had been done between the parties. We cannot say that he erred in refusing an application for a new trial, made under such circumstances, and supported by affidavits of this kind.

Judgment affirmed.

JOSEPH CARMENA v. SAMUEL L. DOHERTY and another.

Notice of the protest of a draft, instead of being directed to the endorser at the post office at which he was in the habit of receiving his letters, was directed to that office, under cover to the holder, who received the notice, and, on the next day, deposited it in the same office, directed to the endorser there: *Held*, that the notice was insufficient under the statute of 13 March, 1827; that it should have been directed to the endorser at his domicil or usual place of residence, and not have been sent to a third person to be subsequently deposited in the same post office; and that where the mail is resorted to as the earliest ordinary conveyance, such conveyance must not be interrupted.

Notice of protest to an endorser, deposited in the post office of the place in which, or in the neighborhood of which, he resides, is insufficient under the general commercial law.

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APPEAL from the District Court of West Feliciana, Johnson, J. G. S. Lacey, for the appellant. A bank with whom a note is left for collection, is, like other endorsers, entitled to one day to give notice. Bayley on Bills, 263-9, and cases there cited. Chitty on Bills, 288. 3 Kent's Comm. 106. If the bank be not regarded as an endorser, it must be looked upon as the agent of the holder, and the one day taken by the bank must be considered as taken by the holder. Again: the notary is entitled to time to ascertain the residence of the endorser, and the notices were enclosed to the cashier of the bank, as the means of obtaining such information; and the notices were properly directed, and sent the day after the information was procured.

Joer, on the same side.

Boyle, Ratliff, and Paterson, for the defendants, cited 5 La. 265. 16 Ib. 20, 283, 310.

Simon, J. The defendants are sued as endorsers of a draft, which was protested for non-payment at maturity. They pleaded the want of legal notice. There was judgment of nonsuit below against the plaintiff, from which he has appealed.

The certificate of the notary states, that the endorsers were notified of the protest by letters to them addressed, and served on them, by enclosing the notices for the drawer and endorsers in the one for N. C. Hall, Esq. cashier, which the notary directed to him at St. Francisville, and depositing the same in the post office in the city of New Orleans, where the protest was made.

The testimony of Wm. Christy, the notary, proves, that the notices for the defendants were forwarded enclosed in the notice to N. C. Hall, who states, that he received the notices of protest by the first mail after the protest of the draft, and that there were three notices, two of which were directed to the defendants. Hall adds, that he was in the habit of putting the notices in the post office on the day after he received them; that these notices were directed to St. Francisville, and put in that office; and that they were sent to the post office at St. Francisville, which, he believes, is the office at which the endorsers are in the habit of getting their letters.

The testimony of Collins establishes, that the defendants reside in the parish of West Feliciana, and in the country; that

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Samuel L. Doherty resides about twenty miles from the town of St. Francisville, and Anthony Doherty about eighteen miles from said town. He further states, that the post office at Laurel Hill, in the parish of West Feliciana, is much nearer the residence of Anthony Doherty than the one at St. Francisville; and that the post office at Pinckneyville, in the State of Mississippi, is much nearer the residence of Samuel L. Doherty, than the one to which the notice was sent.

We think the judgment appealed from is correct. The notices, instead of being forwarded by the notary addressed to the defendants at their domicil, or usual place of residence, (B. & C.'s Digest, 43, § 14,) were sent enclosed in a letter to another person, who, although he states he received them by the first mail after the protest, proves that he kept them, and did not put them in the post office, according to his habit, until the day after he received them. These notices, after having been taken out of the post office, (the evidence does not show when,) were deposited there again on the next day, directed to the defendants at the very place where said post office is kept; they were not to be conveyed by mail to some other post office, but were to remain there until sent for by the defendants. Under these facts, it is clear that, either under the act of 1827, already referred to, or under the commercial law, the notice is insufficient. It is a rule well recognized, that notice must be given by the earliest ordinary conveyance, unless under extraordinary circumstances which may excuse a greater delay. Under the statute, the mail is pointed out as being, in a case like this, the earliest ordinary conveyance; but such conveyance must not be interrupted on its way to its destination. The notice is to reach the post office to which it is addressed, in order that it may be there delivered to the person to whom it is directed, after the arrival of the mail. Here, the notices were taken out of the post office where they were to remain, were deposited there again on the next day, and, if it be true, that the endorsers were in the habit of receiving their letters there, we may fairly presume that they called for their letters after the arrival of the mail by which they were conveyed to Hall, and that, under the circumstances, they could not then be delivered to them. This must have occasioned a delay which

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cannot be excused, as it was the duty of the notary to direct the notices to the endorsers at their domicil or place of residence, and not to send them to a third person, for the purpose of being subsequently deposited in the same post office.

Under the commercial law, this notice is equally insufficient; as, when in the hands of their co-endorser, Hall, the cashier of the bank in which the draft had been deposited for collection, it should have been sent to the defendants by some other mode of conveyance. It is well known that, under the commercial law, it is not sufficient notice to an endorser, to deposit the notice in the post office of the place or town in which, or in the neighborhood of which he resides. 5 Mart. N. S. 139. Ibid. 158. Ibid. 360. 6 Mart. N. S. 508. 7 Ibid. N. S. 492.

The objection resulting from the proof that there are other post offices nearer to the defendants' residences, might perhaps, also be successfully urged; but it is unnecessary to express any opinion upon it.

Judgment affirmed.

THE CITY BANK OF NEW ORLEANS v. AMOS KENT.

Where an appellant fails to comply with the condition on which an appeal was allowed, by not giving bond within the time during which an appeal may be taken, the judgment will become res judicata.

APPEAL from the District Court of East Baton Rouge, Johnson, J.

Avery, for the plaintiffs, moved to dismiss this appeal, on the ground that no bond was executed, or citation of appeal issued, within twelve months from the date of the judgment allowing an order of seizure and sale against the defendant, citing Sibley v. Roman Catholic Congregation of Natchitoches, 3 Rob. 77.

Elam, for the appellant.

Bullard, J. The appellee moves to dismiss this appeal, on the ground that no bond was given and no citation issued until more than a year after the rendition of the judgment, although the appeal was allowed within the year.

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The question is not an open one. In the cases of Marigny v. Stanley et al., and Marigny v. Ingraham, this court held, that if the appellant do not comply with the condition on which the appeal was granted, by giving bond to prosecute the appeal, and suffer a year to elapse, the judgment becomes res judicata, and he cannot be relieved either in the District or Supreme Court. 2 La. 322, 324. 3 Robinson, 77.

Appeal dismissed.

MATTHEW BETHANY v. HIS CREDITORS.

No re-inscription of a mortgage is necessary, where the mortgager has made a surrender of his property and obtained a stay of proceedings. C. C. 3326. Per Curiam: The rights of the creditors of an insolvent must be acted on with reference to their situation when his bilan was filed, and all proceedings against him stayed.

Satisfaction of a judgment may be proved by presumptions, as well as by positive evidence. The sufficiency of the proof must depend on the circumstances of each case.

APPEAL from the District Court of East Feliciana, Johnson, J. Boyle, for the appellant.

J. P. Bullard, for the syndic.

Morphy, J. On the syndic in this case filing a tableau of distribution, its homologation was opposed by John C. Morris, because he was not placed thereon as a mortgage creditor for \$551 64, being the amount of a judgment which he avers, was rendered against the insolvent, in his favor, on the 26th of April, 1832, and was recorded in the parish of East Feliciana, on the 4th of May, following. The syndic pleaded prescription against the judicial mortgage claimed by the opponent, it not having been re-inscribed since the 4th of May, 1832, and not having been presented until the filing of this opposition, on the 25th of November, 1842. On the trial of the case, the Judge below being satisfied that the opponent had been paid the amount of his judgment, overruled his opposition, from which decision he has appealed.

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It does not appear from the record at what time the surrender was made, but it must have been before the month of January, 1841, at which time the tableau of distribution shows, that the property of the insolvent was sold. No prescription had accrued against the opponent's mortgage, at the time of the failure. the rights and claims of the creditors of an insolvent are, we apprehend, to be examined and passed upon, with reference to the situation in which they stood when his bilan was filed, and all proceedings against him stayed. Creditors holding mortgages on an insolvent's estate, can no more suffer from their failure to reinscribe them, than creditors who had no mortgage can acquire one by an inscription made after the surrender. Civ. Code, art. 3326. Even in France, where it is considered that nothing but re-inscription will interrupt prescription, it has been determined, that it is not necessary to re-inscribe mortgages at the end of ten years, if at or before that time the debtor has failed. Sirey, 1812. P. 2. p. 408.

In relation to the payment of the debt, the evidence shows, that Morris obtained his judgment in April, 1832. A fi. fa. was issued, under which property was seized and was about to be sold. when an agreement was entered into between his attorney, James J. Weems, and Bethany, that the sale of the property under seizure should be postponed until the 15th of September following. and that on that day, the Sheriff should proceed to sell without any further advertisement, unless the debt should have been previously paid. Nothing further was done in the suit up to the failure of Bethany, except that, early in 1833, Morris paid the Clerk's and These officers testify, that both Morris and his at-Sheriff's fees. torney, Weems, were extremely attentive and vigilant in the collection of debts; and the record shows, that in the same court Morris recovered two other judgments against the insolvent, one for \$100, and the other for \$350, in the years 1838 and 1839, and that both these judgments, smaller in amount and of more recent date, were followed up by executions and twelve months' bonds obtained, while no further demand was made, or any steps taken to collect the larger and older judgment either by Morris, or by Weems, who was his attorney in obtaining the three judgments. These facts, coupled with the refusal of Weems, the former attor-

ney of Morris, and now the syndic of Bethany's creditors, to put this judgment on the tableau, raise a strong presumption that it has been paid. This presumption Morris might have destroyed by interrogating the syndic, who could not testify for himself: but he found it probably unsafe to do so. Proof of the discharge of a judgment may be made by presumptions, as well as by positive evidence. The sufficiency of the proof must depend upon the circumstances of each case. We cannot say that there is error in the judgment of the District Court. 2 La. 28, 481. 6 La. 31. 9 La. 418.

Judgment affirmed.

THEODORE RHODES and another v. THE UNION BANK OF LOUISIANA.

A judgment of a Court of Probates homologating the proceedings of a family meeting, and ordering certain real property belonging to minors to be mortgaged, cannot be annulled in a direct action before a District Court. Per Curiam: The action should have been before the Probate Court.

After a motion to dissolve an injunction, plaintiff cannot, by filing an amended petition containing new allegations, cure a radical defect in his original proceedings, and thereby give effect to an injunction originally illegal.

APPEAL from the District Court of East Feliciana, Johnson, J. Z. S. Lyons, for the appellants, contended, that this was an action to annul a judgment of the District Court, and that the District Court had jurisdiction; (C. P. 608, 610;) and that the proceedings of the Probate Court were inquired into collaterally only, which the District Court had a right to do. 12 La. 394. 14 Ibid. 149. 17 Ibid. 249. 1 Robinson, 116. 1 La. 19. Ibid. 517.

J. P. Bullard, for the defendants. The District Court was without jurisdiction. 1 La. 19. 14 La. 146. The judgment of the Court of Probates is conclusive. 11 La. 149. 13 Ibid. 431.

SIMON, J. The plaintiffs represent, that they are the legal forced heirs of John Rhodes, deceased, and of his wife Sarah Rhodes, now surviving. That their father's succession was

opened in the parish of East Baton Rouge, and that there are other heirs of the deceased, two of whom are minors, and one of age, all residing in the said parish. They further state, that their father died possessed of certain property, (a tract of land and slaves.) which they describe. That in 1825, their mother, acting as their tutrix, applied by petition to the Court of Probates of the parish of East Feliciana, praying that a family meeting might be convened, for the purpose of authorizing her to mortgage the said That a family meeting was convened accordingly, property. whose deliberations and proceedings were homologated. That in consequence thereof, their mother passed an act of mortgage of the said property in favor of the Union Bank of Louisiana. That in October, 1839, a suit was brought on the act of mortgage against their mother as tutrix, in the District Court of said parish, praying for a judgment against her on the obligation by her executed to the Union Bank, whereon a judgment was obtained in April, 1840, against all of the said property inherited by the petitioners and their co-heirs; and that executions to enforce said judgment have been recently issued from said court.

The petitioners aver that their mother had no right to mortgage the said property, and that the act of mortgage and all the proceedings relative thereto, as well as the judgment obtained against the property in the District Court, ought to be declared null and void, on various grounds set forth in their petition, all which go to show the illegality and irregularity of the proceedings had before the Probate Court. Wherefore they pray, that the mortgage and proceedings, and the judgment obtained under the same, may be declared null and void; that the property may be declared free from the incumbrance; and that an injunction may be issued to restrain the Sheriff and the Bank from proceeding any further in executing said judgment, &c.

The injunction applied for was granted and issued, and the defendants subsequently filed their written motion to dissolve it, on the following grounds:

1st. That the District Court has no jurisdiction to annul the decree of homologation of the family meeting, the same having been rendered by the Court of Probates.

2d. That until said decree of homologation, and the act of

mortgage passed in consequence thereof, be annulled by the proper tribunal, the decree and judgment complained of cannot be attacked, on account of any such pretended nullities as are relied on.

3d. That the decree of homologation of the proceedings of the family meeting, and the judgment of the District Court, cannot be attacked in any court, without making the plaintiffs' co-heirs parties to the suit; and those who are minors, through their tutrix.

After the filing of this motion, the plaintiffs obtained leave to file another ground of nullity of the judgment complained of, to wit, that "the defendants in said suit could not stand in judgment, nor bind the petitioners by any judgment she might confess or suffer to go against her in said suit." This supplemental ground was objected to by the defendants' counsel, admitted by the court, and a bill of exceptions taken.

The defendants' motion was sustained by the court, a qua, which dissolved the injunction at the plaintiffs' cost; and the latter have appealed.

The District Court did not err. The petition on which the injunction was obtained and sued out, does not contain any allegation of nullity against the judgment on which the executions complained of were issued. That action is based solely on grounds of nullity set up against the decree of the Court of Probates and the proceedings relative thereto, in consequence of which the mortgage on which the judgment was obtained had been executed; and the evidence shows, that said mortgage was executed after a decree of the Court of Probates was rendered. reciting, that " a family meeting having advised that the natuval tutrix of the minor heirs of John Rhodes, deceased, should be authorized to mortgage the real property of the succession, for the purpose of borrowing money to purchase and pay for property for the minor heirs; and the under-tutor of said minors having concurred in that advice, and agreed that the said deliberations be homologated, said act of deliberations is so homologated and made final as the judgment of the court."

Now, it is well settled in our jurisprudence, that "where there is a formal decree of the Court of Probates, recognizing the neces-

sity of the sale of property for the payment of debts, the purchaser is not bound to look beyond said decree, which has the force and effect of a judgment;" (11 La. 149; 13 Ibid. 434;) and that the nullity of such judgment cannot be sought in a direct action in the District Court. 1 La. 19. 14 Ibid. 146. In the latter case, we recognize the right of the District Court to examine into matters of probate jurisdiction, when brought before it collaterally, and vice versa; but not deeming the nullity of the probate sale to have been brought before the District Court collaterally, but on the contrary, considering it as the basis of the suit itself, we could not sanction a proceeding which had for its object a direct action of nullity. Here, the real and avowed object of the suit is, to avoid, cancel and annul the decree of homologation, in consequence of which the mortgage complained of was executed; and it is so clear, in our opinion, that so far from being brought before the District Court in a collateral manner, the alleged nullity of the decree and proceedings of the Probate Court is the very foundation of the action, to protect which the injunction was obtained.

The case of Lessassier v. Dashiel, relied on by plaintiffs counsel, (17 La. 198,) is not analogous; and so far as it goes, supports even the defendants' position. There the question was, whether there was such a final judgment of the Probate Court as would be considered sufficient to protect the defendants against the plaintiff's action; and we again recognized the doctrine that when rights have been acquired by third persons, under the faith and protection of the decree of a court of competent jurisdiction, such decree should have its effect until reversed or annulled in a direct proceeding or action. 16 La. 120. Here again the judgment or decree of the Court of Probates, which is the subject of the present action, and which is sought to be annulled and avoided in the District Court, is a final one; it homologates the previous proceedings; it is the basis of the mortgage on which the judgment was rendered; and it is clear that the court, a qua, has no jurisdiction to set it aside. This action should have been brought before the Probate Court.

It has been contended, that the amendment to the original petition, permitted to be filed by the inferior court, alleges a ground of nullity in the judgment of the District Court, per se, and that

therefore, it should be sufficient to keep the case there. This amendment was perhaps improperly allowed, as thereby jurisdiction is sought to be given to a court which originally had none; and as a party cannot, by an amendment to his petition, be permitted to change the nature and object of his original action. But be that as it may, the alleged ground of nullity contained in the amendment, was not before the court when the injunction was granted. It is not sworn to; it was presented long after the filing of the motion to dissolve the injunction; and we are not prepared to say that a party can be allowed, by the mere subsequent filing of an allegation, unsupported even by an oath, to cure the radical defect which existed in his original proceeding, and thereby give effect to an injunction which was originally illegal and wrongfully sued out.

Judgment affirmed.

Joseph Lallande v. Elijah M. Terrell and Wife.

Plaintiff having recovered judgment against defendant, who was in community with his wife, caused a ft. fa. to be levied on certain lots of ground, which were purchased by A. at twelve months credit, who gave his bond for the price. Defendant subsequently made a surrender to his creditors; and plaintiff afterwards preceeded against the purchaser, under the 13th section of the act of 20 March, 1839, propounding interrogatories to him to ascertain whether he had property in his possession or under his control belonging to defendant, in which proceedings the syndic of defendant's creditors intervened, claiming the property as belonging to the insolvent's estate. The purchaser answered, that he was requested by defendant's wife to purchase the property for her; and that he purchased the property, taking the title in his own name, but considered himself bound to make her a title therefor, provided the price be paid to him when the bond matures, and not otherwise. The court, before which the proceedings under the act of 1839 were instituted, considered the purchase to have been made for the benefit of the community, and decreed the property to belong to the syndic, by whom it was sold, and purchased by plaintiff. Before the bond matured, defendant's wife obtained a judgment of separation of property, and, on the day of its maturity, tendered the price to A., demanding a conveyance of the lots. In an action by plaintiff to recever the property: Held, that the wife, not being a party to the proceedings under the act of 1839, the judgment in favor of the syndic does not conclude her; that though the community existed at the time of the purchase by A., yet that, at the maturity of the bend when the conveyance was

to be made to the wife on her paying the price, she was separated in property, and capable of acquiring property for herself, independently of her husband; that the title was suspended, remaining in A., hable to be divested, on the performance of the condition, at the maturity of the bond; and that the fact that the wife was capable of acquiring at the expiration of the time limited, sufficed to make the contract valid, and to give her a good title to the property, independently of her husband, on her compliance with the conditions of the agreement.

APPEAL from the District Court of St. Tammany, Jones, J.

L. Janin, for the appellant. The question in this case is, can a wife in community, who has no means of her own, purchase property and make it paraphernal, by borrowing money on her own credit, to pay for it? No such device can take the case out of the operation of art. 2371 of the Civil Code. The debt in this case is a community debt, and the property belongs to the community. A purchase in the name of a wife makes the property paraphernal, only when it is shown, that the funds thus invested were, at the time of the investment, paraphernal.

Penn, for the defendants, cited 17 La. 300. Terrell v. Cutrer, 1 Robinson, 367.

Bullard, J. This suit is brought to recover of the defendants certain lots in the town of Covington, under the following circumstances;

The lots belonged formerly to Terrell, who was in community with his wife Adeline. 'The plaintiff, Lallande, having recovered a judgment against Terrell for a considerable amount, caused a fieri facias to be issued, in virtue of which the Sheriff sold the lots, with others, on the 21st May, 1841, on a year's credit, and Thomas W. Minter became the purchaser, for \$100, and gave his twelve months' bond, with security for the price, with eight per cent interest. E. M. Terrell afterwards made a surrender to his creditors, and Isaac W. Cutrer was appointed syndic. Lallande, in June, 1841, proceeded, under the act of 1839, relative to garnishments, against Minter, the purchaser of the lots, alleging that he had property or effects in his possession, or under his control, belonging to Terrell, his debtor. Minter was required to answer, on oath, the following interrogatories: 1st. Have you or have you not in your possession, or under your control, property belonging to E. M. Terrell, &c. 2d. Are you

not in possession of a certain house and lot in the town of Covington, which was lately seized in the above mentioned suit of Joseph Lallande v. E. M. Terrell, and sold at Sheriff's sale. &c.; or, if you are not in possession, who is, and with what understanding, &c. 3d. Did you or did you not apparently become the purchaser of the same, and was the title thereto not made out in your name, and is it not still in your name? and were you not requested by the said E. M. Terrell, or his wife, to bid in said property for account of the wife of said Terrell, and did you not bid in the property, and do you not hold it agreeably to said request? 4th. Did or not the said E. M. Terrell promise to pay the twelve months' bond given for said property at its maturity; and do you not consider yourself in honor bound to make a title to said property whenever it shall be required, either to the said Terrell or to his wife? 5th. The defendant was required to state what changes had taken place since the filing of the interrogatories.

On the 3d of November, 1841, the syndic of the creditors of Terrell intervened in this proceeding, alleging that the property in possession of Minter belonged legally to the creditors of Terrell, inasmuch as the same was acquired during the existence of the community between Terrell and wife; and he asks for judgment for the same, as forming a part of the property surrendered.

On the same day Minter answered the interrogatories upon oath. To the first, he answered, no; that he has neither in his possession nor under his control any property of E. M. Terrell; but that he has a title to some property which he expects to convey to Mrs. Adeline Terrell, as soon as she pays him the purchase price, (he sets forth the property, which is the same now sued for,) which he acquired by purchase at a Sheriff's sale, sold as the property of E. M. Terrell at the suit of Joseph Lallande. To the second, he answers, no. I am the owner of said property, having purchased the same at a Sheriff's sale as aforesaid. Mr. Terrell occupies the property with the understanding between affiant and Mrs. Adeline Terrell, that when she pays for it, affiant is to make her a title for the same. To the third, he answers: I became the purchaser of the above described property, with some other, on the 21st May, 1841, as aforesaid. The title was

made to me and in my name. I was requested by Mrs. Adeline Terrell to bid in the property for her, which I did, and now hold the said property under said request, under the condition that when she pays for it, she is to receive a title thereto. To the fourth interrogatory, he answered, no; but Mrs. Terrell promised to pay this affiant the amount of the purchase price, that is, the price at which he purchased it at the Sheriff's sale, at which time affiant agreed to make her a conveyance. I am in honor bound to make said title, provided the purchase price is paid when the twelve months' bond matures, and not otherwise. To the last, he says, that the property has undergone no change since the filing of these interrogatories.

Upon this evidence the court considered the purchase made by Minter for Mrs. Terrell, as in truth a purchase for the community, and decreed the property to the syndic, as belonging to the creditors under the surrender of Terrell. Thereupon the same was sold at syndic's sale, and the plaintiff, Lallande, became the purchaser for \$150.

In the mean time, and before the twelve months' bond fell due, Mrs. Terrell obtained a judgment of separation of property from her husband, to wit, in November, 1841. On the day the bond fell due, May 21st, 1842, Mrs. Terrell, through the ministry of a notary public, tendered to Minter one hundred dollars, the stipulated price, and demanded a compliance with his contract, and a conveyance of the lots.

The plaintiff, Lallande, having purchased the lots at the syndic's sale, as above stated, brought the present action to recover them, in April, 1843, of Terrell and wife, who had always remained in possession.

Upon this statement of facts, it is obvious, first, that the defendant, Mrs. Terrell, was not a party to the case in garnishment, and that the judgment in favor of the syndic does not conclude her; and, secondly, that although the community existed at the time of the purchase by Minter under the understanding above stated, yet that at the maturity of the twelve months' bond, when the conveyance was to have been made to Mrs. Terrell, on her paying the price, she was separated of property, and capable of acquiring property by purchase for herself, independently of her

husband. The question, then, is, did the title vest de præsenti in Mrs. Terrell, by the agreement with Minter, or was there a suspensive condition, by which the title remained in the mean time in Minter, liable to be divested on the performance of the condition, at the maturity of the bond? and, if so, does it not suffice that she was capable of acquiring at the expiration of the time limited by the agreement, on her compliance with the condition upon which the vesting of her title depended?

The answers of Minter to the interrogatories propounded by the plaintiff himself, and which, consequently, are evidence as to him, show that Minter purchased and took the title in his own name, and became himself bound for the price. He says: "I am the owner of the property, having purchased the same at a sheriff's sale, subject to the condition that when Mrs. Terrell shall pay the price, I am to make her a title." Under these circumstances we cannot doubt, but that Minter was the real owner, under an obligation to convey or sell, at a future day, on Mrs. Terrell's complying with certain conditions. If, in the mean time judgments had been rendered against Minter, they would have operated as judicial mortgages on the lots in question. the house had been burnt, it would have been the loss of Minter. " Res perit domino." Mrs. Terrell would not have been bound to accept the conveyance and pay the price agreed on, if the property had become, in the mean time, incumbered, at least without security against disturbance. He could not require the payment of the price during the year. The condition was, therefore, suspensive; and it is well settled, that if the thing which forms the object of an onerous contract perishes, pendente conditione, it is the loss of the debtor or vendor. Duranton, Contrats et Donations, 2 vol. No. 487. 1 Pothier, Oblig. No. 218.

If it should be said that the performance of a suspensive condition has a retroactive effect, and that it is precisely as if Mrs. Terrell had acquired, on the 21st of May, 1841, while she was yet in community, it may be answered, that a married woman in community, is not absolutely without capacity to acquire property by purchase in her own right. She may even purchase from her husband in a bona fide replacing of her dotal effects; and she may sell to him in payment of a sum promised as dowry.

Civ. Code, art. 2421. This court has, on more than one occasion, recognized the capacity of the wife to acquire property either by a dation en payement by her debtor of a paraphernal debt, or by a bona fide re-investment of her paraphernalia, when she administers it independently of her husband. 17 La. 300. 1 Robinson, 367.

But when Minter was put in default by a tender of the price and a demand of compliance with his promise to sell, Mrs. Terrell had clearly a legal capacity to acquire by purchase; and there is no ground for supposing, that the money tendered belonged to the community, which was dissolved, and all the property of the husband in the hands of the syndic of his creditors. may have depended upon the liberality of friends to furnish her the means of paying for the property at the stipulated period; and when the money was so advanced, it was not as a charge upon the community, which no longer existed. The money must be considered as belonging to Mrs. Terrell, furnished her after her separation, either as a donation, or on her personal credit, and not on that of her husband. We are, therefore, of opinion, that the capacity of the defendant to acquire, at the time when the title was to vest according to the understanding of the parties. was sufficient to make the contract valid, and to give her a good title to the property, independently of her husband, on her complying with the condition.

This view of the case supports the verdict of the jury, and the judgment of the court below.

Judgment affirmed.

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NANCY B. FULTON v. JOEL C. FULTON, Her Husband.

No period is fixed by the Civil Code, within which a wife, who has obtained a judgment of separation of property, must commence proceedings under her judgment. It requires only that there shall be a bona fide non-interrupted proceeding to obtain payment. Where a judgment of separation was obtained on the 3d of July, and duly advertised, but no execution was issued till the 28th of October following, the delay is not such as to deprive the wife of the right of enforcing her claim against her husband, and to render her judgment null, especially where no right has been acquired in the mean time, by any third person. C. C. 2402.

Plaintiff having sold a tract of land before her marriage, received certain notes for the price. The notes matured after her marriage, when, the purchaser being unable to pay, agreed to rescind the sale, and, on receiving his notes, reconveyed the property to the plaintiff. She subsequently resold the property to a third person, her husband assisting in the sale, and receiving the price. Held, that the retransfer made to the plaintiff by the first purchaser, cannot be viewed as a purchase made during the marriage; that the land became the property of the petitioner, in the same manner as if the first sale had been judicially rescinded; that she held it by the title she had before her marriage, as though no sale had been made; and that, consequently, it never belonged to the community.

All the privileges and mortgages existing on property sold under execution, where the debtor has no other property to pay his debts, are transferred from the property to its proceeds, the distribution of which must be made as in case of a concurso. C. P. 301, 401, 402, 403. And where a balance of the proceeds of property sold under execution, remaining after satisfying the plaintiff's claim, is seized under a fi. fa. by a third person, the latter can acquire no greater right than if he had seized the property itself.

Appeal from the District Court of East Baton Rouge, Johnson, J.

Cook and Elam, for the plaintiff, cited, 5 Mart. N. S. 257. 17 La. 295. 11 La. 557.

Brunot, for the appellant, cited Civ. Code, arts. 2371, 2373, 11 La. 534-7. Campbell v. His Creditors, 3 Rob. 106. Davidson v. Stuart et al. 10 La. 148. De Blanc v. De Blanc, 4 La. 419.

Morphy, J. The petitioner having recovered against the defendant, her husband, a judgment for \$900, in an action for a separation of property, took a rule on the Sheriff of the parish of East Baton Rouge and the Bank of Louisana, to show cause why a sum of \$488 56, in the hands of that officer, should not be paid over to her in preference to the Bank, which had levied an exe-10

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cution thereon, on the 16th of December, 1841. This money was a balance of the proceeds of a house and lot belonging to the defendant, which had been sold under a *fieri facias* issued on a twelve months' bond, at the suit of one William Robb, a judgment creditor. The rule was made absolute, and the Bank has appealed.

It is urged by the appellant's counsel, that the opponent has lost her rights, if she ever had any, under her judgment of separation. by neglecting to follow up and enforce the same against her husband, as required by article 2402 of the Civil Code; and he invokes the rule, vigilantibus, non dormientibus, leges subveniunt. The record shows, that Nancy B. Fulton obtained her judgment of separation on the 3d of July, 1841; that it was duly advertised; and that she took out an execution under it, on the 28th of October following. She might, to be sure, have been more diligent in the pursuit of her rights, but as this court had occasion to remark in Bertie v. Walker, (1 Rob. 431,) our law is less rigorous on this subject than the Napoleon Code. The latter provides, that there must be a beginning of pursuit, or proceedings under the decree of separation, within fifteen days from its date, if no settlement of the rights of the wife has been made by an authentic act, otherwise the decree of separation becomes a nulity; while our Code fixes no peremptory delay within which the pursuit or proceedings of the wife under her judgment must be commenced. It requires only a bona fide, non-interrupted suit to obtain payment. It does not appear to us, that there has been in this case such an unusual delay or interruption in the suit, as should deprive the plaintiff of the right of enforcing her claim against her husband, and render her judgment null and void, especially as no right has been acquired by any third party in the mean time. Civ. Code, art. 2402.

If the rights of the parties were to be tested by the degree of vigilance which they displayed, as the appellant's counsel seems to believe, it would not assist him, as the record shows, that the Bank obtained their judgment against the defendant on the 23d of June, 1841, and sued out an execution only on the 18th of November following, a longer delay or interruption, than that which occurred in the proceedings of the plaintiff against her husband,

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and that the money in dispute might and should perhaps have been levied upon by the Sheriff under her fi. fa., which had been placed in his hands some weeks before that of the Bank. But, be this as it may, the petitioner rests her claim to a preference over the appellant on her legal mortgage on the property, of which the proceeds are in the hands of the Sheriff. This right of preference we will proceed to consider, as soon as we shall have disposed of another objection urged by the appellant.

It is contended that the \$900 recovered by the plaintiff as money received by her husband for her account, was the price of two tracts of land sold in 1837, which the plaintiff had acquired by purchase subsequently to her marriage with the defendant, and which, therefore, belonged to the community; and that, even if this property was purchased with notes, the separate property of the wife, it would only be a charge against the community for their amount, to wit, \$170.

The evidence shows, that previous to her marriage with Joel C. Fulton, the plaintiff owned two tracts of land, which, in 1832, she sold to one James Morrison, from whom she received two notes of \$75 each, maturing on the 1st of March of the years 1834 and 1835; that her marriage took place in the autumn of 1833; that on the 20th of October, 1835, Morrison being unable to pay his notes, agreed to rescind the sale, and on receiving back his notes, reconveyed the property to the plaintiff: that in 1837, she sold the same land, in her own name, to one James Mansker, for the sum of \$900; and that her husband, who had assisted her in the execution of the sale, received this money, the greatest part of it in cash, and the balance in a receipted account for a debt he owed Mansker. Under these facts it is clear that the property sold in 1837, never belonged to the community. retransfer made to the plaintiff, in 1835, by Morrison, cannot be viewed in the light of a purchase made during the marriage. He voluntarily did that which his vendor could have obtained by bringing against him an action to rescind the sale, on account of his failure to pay the price. The land became the property of the petitioner, in the same manner as if the sale to Morrison had been judicially rescinded; and she held it by the title which she had before her marriage, as though no sale had been made.

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therefore, never belonged to the community. 12 Toullier, Nos. 190, 195.

In relation to the question of preserence, the evidence shows, that the defendant has no other property on which the plaintiff can enforce her legal mortgage. In such a case she was authorized to come in by way of opposition, and claim to be paid out of the proceeds of the property subjected to her mortgage, in preference to seizing creditors having no anterior liens or mortgages. The Bank, by seizing the proceeds of the property, cannot have greater rights than if it had seized the property itself. Arts. 301, 401, 402 and 403 of the Code of Practice, under which the plaintiff has proceeded, clearly contemplate that all the privileges and mortgages existing on property sold under execution, when the debtor has no other property to pay his debts, are transferred from the property to its proceeds; and that a distribution of such proceeds is to be made as in a case of concurso, the seizing creditor's privilege to take rank only after that of creditors having certain privileges or mortgages. 3 Rob. 106. We, therefore, conclude that the Judge decided correctly, in allowing the opponent her right of preference on the proceeds of the property, on which she had a mortgage much older than that of the appellant.

Judgment affirmed.

THE UNION BANK OF LOUISIANA v. JEFFERSON LEA and another.

Where a notary states in his protest of a note, "that he demanded payment of the note of the cashier" of the bank, at which it was payable, at the bank, "who answered that it could not be paid, there being no funds in bank for that purpose," it is sufficient. On an objection that there was no evidence that the notary presented the note to the cashier: Held, that the latter having said there were no funds to pay the note, no presentation was necessary.

The holder of a protested note must give notice of the protest to every one to whom he intends to resort. He need not give notice to any other person.

An appellant will not be allowed, by delaying to complain, till after appeal, of a trivial error in the judgment, which would have been corrected below had it been asked for, to mulct the other party with costs of the appeal.

The Union Bank of Louisiana v. Lea and another.

APPEAL from the District Court of Livingston, Jones, J. Denis, for the plaintiffs.

R. H. Chinn, for the appellant.

MARTIN, J. The defendants were sued as endorsers of a promissory note. There was a judgment in favor of Lea, and against Davidson, who has appealed.

Our attention is drawn to a bill of exceptions to the admission in evidence of the *procès-verbal* of the notary of the demand and protest, with the evidence of notice, on the ground that there was no second copy of the note, and that the demand and protest, with notices, are not such as were contemplated by the act of the Legislature.

We are unable to understand on what ground a second copy of the note was requisite; and neither the appellant, nor the counsel, has assisted us in finding it out. The demand was made at the place where the note was payable, and notice is stated in the protest to have been given to the appellant, in print and writing, by putting such notice into the post office of the town where the protest was made, directed to him at Springfield, parish of Livingston, Louisiania.

The District Judge did not err in overruling the objection.

On the merits, it has been contended, that there was no presentation of the note in due time and at the proper place; that no notice was given to the payee and first endorser, and no sufficient one given to the defendant; and that there was an overcharge of interest.

The note bears date the 19th of November, 1840, and was payable twelve months after, or on the 19th of November, 1841. The third day of grace was the 22d, and the *protest* was made on that day, and at the place at which, on its face, the note was payable. It is urged, that it in no way appears that the notary presented the note to the cashier.* When the notary of a bank receives a note to be protested, he goes to the drawer and demands payment; if he is answered that it will not be paid, he

^{*}The notary certified in his protest, "that he demanded payment of the note of the cashier" of the bank at which it was payable, at the bank, "who answered that it could not be paid, there being no funds in bank for that purpose."

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does not take it out of his pocket-book or out of the bundle which contains it, to present it, for that would be a vain ceremony. Lex neminem cogit ad vana. The cashier having said that there were no funds to pay the note, no presentation was necessary.

The holder of a note must give notice to every one to whom he intends to resort. He need not give it to any other. If the first endorser was not notified by the Bank, it lost its recourse on him. If the second endorser, the present appellant, wished to recur to him as his own endorser, it was his duty to give notice. The Bank was not bound to do it for him.

The petition describes the appellant as a resident of the parish of Livingston. The answer does not deny this. The notice was directed to him at Springfield, which is the place where the courts of the parish are holden, and where there is a post office. If there was another office within the parish or elsewhere, nearer to his residence, he should have shown it.

To the overcharge of interest, the principle of the common law, De minimis non curat lex, or that of the Spanish law, Lo poco por nada se reputa, is applicable. The fractions of a day are not noticed by law. The banks do not pay the proceeds of discounted notes, until the afternoon of the discount day, yet they charge the interest for the fore-part of the day, as well as for the latter part, during which only the person who obtains the discount possesses the money; yet no one would imagine that they are thereby chargeable with usury. This was a lapsus calami in the judgment, which would have been corrected below, had it been asked for; and the defendant cannot be allowed, by delaying to complain till the case is brought to this court, to mulct the plaintiff in the costs of the appeal, especially as the counsel of the Bank is willing that the error shall be at any time corrected, and it does not exceed 30 cents.

Judgment affirmed.

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THE UNION BANK OF LOUISIANA v. ALEXANDER GORDON PENN.

The certificate of a notary, though without a date, is legal evidence to show the manner in which the notice of protest to the endorser of a note was served or forwarded. Its insufficiency, from the want of a date, to establish the diligence used in serving the notice, is no reason why it should not be received so far as it goes. Act 13 March, 1827, § 1. It is evidence of all the matters therein stated, and other evidence may be introduced to show a complete compliance with all the requisites of the law. The testimony of the notary may be used to establish the date of the certificate and notice; such evidence, not contradicting, but merely supplying an omission in the certificate. Per Curiam: It might, perhaps, be otherwise, if the evidence was intended to contradict the certificate.

The statute of 13 March, 1827, which authorizes the certificate of the notary by whom a note or bill has been protested, to be used as evidence of the manner in which the demand was made, and notices of protest served, introduced a new mode of proof of the facts therein stated; but it does not preclude a party who may not choose to resort to it, from producing parol evidence of such facts.

Where a notary states in his protest of a note, "that he demanded payment of the note of the cashier" of the bank at which it was payable, at the bank, it is sufficient. It was unnecessary to state that the note was presented when the demand was made.

Appeal from the District Court of St. Tammany, Jones, J. Halsey, for the appellants, cited 3 Mart. N. S. 489. 5 Ibid. N. S. 196. 7 La. 7. 8 La. 170. 11 La. 51, 566. 10 La. 206. 14 La. 327. 15 La. 51. 16 La. 308. 17 La. 479.

Denis, on the same side.

M. G. Penn, for the defendant.

Simon, J. The plaintiffs are appellants from a judgment rendered against them, in favor of the endorser of a promissory note on which this suit was brought. The note sued on was payable at the office of discount and deposit of the Union Bank of Louisiana at Covington, and was protested at the request of the cashier of said Bank. The notary states in the protest, that he demanded payment of said note from said cashier, who answered, that the note could not be paid, as no funds had been deposited in the Bank for that purpose.

The certificate of the notary, from which it was attempted to show that notice had been given to the endorser, states, that "he gave advice of the protest, by notices of even date therewith, to the

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endorser, which he put into the post office of this town, (Covington,) one addressed to him at Cypress Grove in this parish, and one addressed to him at this place." But this certificate bears no date, and is, therefore, insufficient to show the diligence required, by establishing the time at which the notices were served, and the date of the notices said to have been of even date with the certificate.

In order to supply the omission of the notary, and after the official certificate of notice had been produced in evidence and rejected by the court, a qua, on the ground that the certificate bears no date, and does not show the time when the notice was served, the plaintiffs' counsel offered to prove by the notary who made the protest, that the certificate was made, and the notices given simultaneously with the making of the protest, and that the notary never made such certificate without first performing the services. This evidence was objected to by the defendant's counsel, and refused by the court; to all which opinions of the court the plaintiffs' counsel took a bill of exceptions.

We think the Judge, a quo, erred. The official certificate of the notary, so far as it shows the manner in which the notice of protest to the endorser, was served or forwarded, was legal evidence of all the matters therein stated, (B. & C. Dig. p. 43, § 13); and, although incomplete as to the degree of diligence used, as it did not establish the date of the service of the notice, should have been received as proof of the fact that the notice had been served through the post office, in the manner therein mentioned. The law does not say that such certificate used as evidence, shall be, when resorted to, the exclusive proof of notice. It does not mean that it shall show, by itself, a complete service of the notice, and that it should not be received, if it do not establish all the matters necessary to prove the diligence required. It is to be taken as evidence of all the matters therein stated; and if insufficient, we see no reason why it should not be received so far as it goes, and why other evidence should not be resorted to. to show a complete compliance with the requisites of the law, in giving notice of protest to an endorser. It is true, this certificate does not contain all the evidence required; but it discloses facts within the personal knowledge of the notary, and the law says

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that such facts or matters, when officially certified, shall be considered as full proof of what the certificate states to have been done by the notary in the exercise of his duties.

The testimony offered should have been received. Its object was not to contradict the contents of the certificate. merely to supply an omission, by showing the period at which the certificate was drawn and the notice given; nav. to establish the date at which the matters contained or stated in the certificate had taken place. Again, the statute which gives effect to such certificate as proof of the facts therein mentioned. and thereby introduces a new mode of proof, never was intended to exclude any other kind of proof. We have often said, that the written proof provided for by this statute does not preclude the party who does not choose to resort to it, from producing parol evidence of the notice of protest. 7 La. 7. 8 lb. 170. Ib. 566. 17 lb. 479. And we are not ready to say, that a party should not be permitted to prove by parol evidence, such additional facts as may be deemed necessary to establish the notice of protest. It might, perhaps, be otherwise, if the evidence offered was intended to contradict the contents of the certificate; but in this case, it is clear the notary should have been examined as a witness for the purpose for which his testimony was offered.

As to the point, that the plaintiffs' petition does not contain any averment, nor the record furnish any proof that the note was presented by the notary when he made the demand, we think it untenable. The protest states, that the notary demanded payment of the note of the cashier,* and we cannot distinguish this question, from that on which we expressed our opinion in the case of Nott's Executor v. Beard, 16 La. 311. It is precisely similar, and must be governed by the same rules. See, also, the case of Carlisle v. Holdship, 15 La. 375, and Union Bank v. Lea et al., just decided, ante 75.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed; and that this case be remanded to the inferior court for further proceedings, with in-

^{*} The protest certifies that the demand was made at the bank.

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structions to the Judge, a quo, not to reject the certificate of notice of protest produced by the plaintiff, and to allow the notary to be examined as a witness for the purpose set forth in the bill of exceptions. The costs of the appeal to be borne by the defendant and appellee.



A sheriff while he retains possession of sequestered property, is bound to take proper care of it, and to administer it as a prudent father of a family would administer his own affairs; and he is entitled to a just compensation therefor, to be determined by the court. C. P. 283. C. C. 2949, 2950. Where slaves are sequestered he is authorized to make the disbursements necessary for their preservation, and to put them in a place of safety, (C. P. 659, 661); but he cannot hire them out unless expressly authorized by the court, with the consent of both parties. C. P. 662.

APPEAL from the District Court of West Feliciana, Johnson, J. Paterson, for the appellant.

Boyle, for himself and the other defendants.

Simon, J. The plaintiff is appellant from a judgment in his favor, condemning the defendants to pay him, in solide, the sum of \$420, in discharge of the claim set up in his petition. This judgment was rendered on the verdict of a jury, and after an ineffectual attempt to obtain a new trial. The plaintiff complains, that the jury did not give him a verdict for the whole amount of his demand, which, he contends, is sufficiently established by the evidence.

This action is brought on an account for fees and expenses amounting to \$1157, alleged to be due to the plaintiff, as Sheriff of the parish of West Feliciana, for having kept about one year, eleven slaves, under a writ of sequestration issued in the case of Jordan v. H. Black, (14 La. 351,) and for clothing and medical attendance for the same. The account is accompanied by an order of the District Judge allowing the amount, and ordering it to be taxed as costs in the suit; and the defendants are sought to be made responsible for the amount claimed, as having become securities for the costs.

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The defendants joined issue by first pleading a general denial of the plaintiff's allegations. Admitting their liability as sureties, they averred, that it was plaintiff's duty to have hired out the slaves, or to have employed them in such manner as to defray the expenses; and that the services of the slaves are well worth a sum sufficient to defray all their actual expenses, and even leave a balance in favor of the owner.

On the day of the trial, the defendants filed an amended answer, in which they set up a plea in compensation against the plaintiff's demand.

The case presents a mere question of fact. The evidence establishes, that the negroes charged for were the same that were sequestered in the suit of Jordan v. Black, on the 2d of May. 1840, and kept by the Sheriff, under the writ, until the 7th of May. 1841, when they were hired out, under an order of the court, for the sum of \$50, all the expenses of the slaves to be paid by the person hiring them. The negroes were kept in jail, although one of the defendants had offered to take them, and to give a bond: the Sheriff not thinking himself authorized to accept the offer. The plaintiff called for the negroes after they had been in jail some time, and said, that he wished to take them out, as it was too expensive to keep them in jail. Several witnesses were examined to prove the amount of compensation due the plaintiff for keeping the slaves. One said, that he would take about 30 cents per day each, for their keeping; and would not think \$30 a year, a fair compensation for keeping a grown negro. He added, that the value of the food furnished would be off set by the value of the services rendered by the slave. Another testified, that the expense of his negroes, taken all round, is not more than \$25 per year, each. Another witness stated, that he would not charge more than a bit per head for weighing out the allowance of the negroes per week, and two bits per head for the meat per week; he would consider two bits per day unreasonable, as he boards white men at that, and makes money at it. Another said, that for keeping slaves as sheriff, he always charged two bits per day per head, which included clothing and feeding; he always received that sum, and considered it a reasonable charge, and thinks the bill shown him (the account sued on) a reasonable one.

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According to art. 283 of the Code of Practice, the Sheriff, while he retains possession of sequestered property, is bound to take proper care of the same, and to administer it as a prudent father of a family would administer his own affairs; and he will be entitled to receive a just compensation for his administration, to be determined by the court. Civ. Code, arts. 2949, 2950. In the case of the seizure of slaves, the Sheriff cannot hire them out, unless he be authorized expressly by the court, with the consent of both parties; (Code of Pract. art. 662;) and he is authorized to make such disbursements as are necessary for their preservation, and to put them in a place of safety. Ibid. arts. 659, 661. These last provisions may also be considered as properly applicable to the keeping of property sequestered; and thus, it is clear, that the Sheriff is not bound to hire out the slaves sequestered, and to account for the value of their services, unless the parties have given their consent, and the court has made an order to that effect. We are, therefore, of opinion that the Sheriff is entitled in this case to a fair compensation.

But we think also, that the verdict of the jury fixing that compensation, though apparently very moderate, is not so manifestly erroneous as to require our interference. The evidence upon which it is based is somewhat uncertain and contradictory. The witnesses do not agree on the amount of the compensation to be allowed. The jury were the proper judges in such matters; and the Judge, a quo, who had originally approved the plaintiff's account on which his claim is founded, expressed himself satisfied with the amount allowed, by refusing to grant a new trial. Under such circumstances, we do not feel ourselves authorized to say that the jury erred, and that the plaintiff should obtain any relief at our hands.

It is, therefore, ordered and decreed, that the judgment appealed from be affirmed, with costs in the inferior court; those in this court, to be paid by the plaintiff and appellant.

Peet and another v. Dougherty and others.

ELEAZER PEET and another v. JAMES C. DOUGHERTY and others.

A notary cannot be examined as a witness to contradict a statement made by him in a protest. *Per Curiam:* a public officer, who has given a certificate in his official character, cannot be listened as to a witness to prove it false.

Where a notary states in his protest of a note, "that he demanded payment of the note of the cashier" of the bank at which it was payable, at the bank, it is sufficient. It was unnecessary to state, that the note was presented when the demand was made.

APPEAL from the District Court of East Feliciana, Johnson, J. J. P. Bullard, for the appellants, cited Nott's Executor v. Beard, 16 La. 308. Carlile v. Holdship, 15 La. 375. Briggs v. Stafford, 14 La. 381.

A. M. Dunn, contra, cited Chitty on Bills, 401. 1 Robinson, 83.

SIMON, J. The plaintiffs seek to recover the amount of two promissory notes, each for the sum of \$510 62, drawn by Dougherty & McLanahan, and endorsed by Wm. D. Carter, and payable at the Clinton and Port Hudson Rail Road Bank, in Jackson. The issue, on the part of the endorser, is, that he is discharged by the *laches* of plaintiffs.

Judgment was first rendered against the drawers. Execution was issued thereon, and returned, "No property found." A subsequent judgment of nonsuit having been rendered in favor of the endorser, the plaintiffs have appealed.

The notary stated in the protests, "that he went personally to the office of the Clinton and Port Hudson Rail Road Company, in Jackson, La., and demanded from Lewis Sturges, Esq., cashier, payment of the note, but he refused to pay it, alleging that the drawers had no funds, &c." The certificate of notice shows, that the notary put, on the day of the protest, into the post office in Jackson, a note addressed to Wm. D. Carter near Jackson, parish of East Feliciana, La., and a duplicate thereof addressed to him at Port Hudson in the same parish, (he residing about the same distance from either place,) advising him of the protest for non-payment, &c.

The testimony of the notary states, that it was his invariable

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habit, when he went to the bank to demand payment, to take the notes with him; and that he frequently had a number of notes in his hands. It proves also, that he deposited in the post office on the day mentioned in the certificate, the notices therein described, &c.

It appears, however, from a bill of exceptions found in the record, that while the notary was under examination as a witness, the defendants' counsel asked him the following question: "Did you present and demand payment of the notes sued on, at the place designated for payment, on the days of their maturity?" and that this question was objected to by plaintiffs' counsel, and the objection sustained by the court, which refused to allow the witness to answer. We think the Judge, a quo, did not err. The question propounded to the witness was clearly for the purpose of destroying the effect of the statement made by him in the protest; as, from the protest itself, it is manifest that the notes were protested on the days of their maturity, after payment thereof had been demanded by the notary, at the place designated in said notes. The statements of the notary in his protests present no ambiguity. They establish plain and positive facts, and are full proof of the matters therein contained; and we have often held, that a sworn officer cannot be examined as a witness to contradict the evidence of his official acts. case of Briggs v. Stafford, (14 La. 381,) which is analogous to the present, we said, that "a public officer, who has given a solemn certificate in his official character, cannot be listened to as a witness to prove it false." Here, the question is evidently intended to draw out of the witness an answer contradictory of his written statement. It is an indirect attempt to prove, that the notary did not present the notes, and demand the payment thereof at maturity; and this cannot be permitted. In the case of the Union Bank v. Penn, just decided, we said, that the notary should have been examined as a witness for the purpose for which his testimony was offered. But the object of the evidence was very different. It was to establish a fact omitted in the certificate of notice, and to add to the evidence therein contained, the proof of the date of the notice and of the certificate itself, taking said certificate as full proof of the matters therein specified;

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and such evidence was clearly admissible, for the purpose for which it was intended.

As to the main ground of defence, to wit, that the protest should say, that the notes were presented and payment demanded, we think, as we did in the case of the Union Bank v. Penn, that it is untenable. Our jurisprudence is well settled on this subject. See 15 La. 375, 16 La. 308, and Union Bank v. Lea et al., ante, p. 75, and we are of opinion, that the statements of the notary in the protests under consideration show satisfactorily, from the whole tenor of the acts, that the notes were produced and presented for payment; and such payment demanded, at the time and place therein designated.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that the plaintiffs do recover of the defendant Carter, the sum of one thousand and twenty-one dollars and twenty-four cents, with ten dollars costs of protest, and interest at eight per cent per annum on \$610 62, from the 4th February, 1839, and the same interest on \$510 62, from the 4th of April, 1839, until paid, with the costs in both courts.

CHARLOTTE JANE WILLIS v. JAMES S. WILLIS, Her Husband.

A wife has a general legal mortgage on the lands and slaves of her husband for the reimbursement of her paraphernal funds received and used by the latter; and where her mortgage existed before a seizure and sale of such property under a f. fa. at a suit of a creditor of the husband, she will be entitled to be paid by preference out of the proceeds, unless the seizing creditor prove that the husband has other property sufficient to satisfy her claim. C. P. 401, 403.

So long as money received under an execution has not been paid to the seizing creditor, it is not too late to set up claims entitled to be paid by preference out of the amount. The money represents the property of which it is the proceeds, and is subject to the privileges and mortgages which existed on it. C. P. 401, 402, 403.

APPEAL from the District Court of East Baton Rouge, Johnson, J.

Elam, for the plaintiff.

Brunot, for the appellants, contended, that the plaintiff's op-

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position to the payment of the proceeds of the sale of the property to the seizing creditors, was too late; and that the proceeds became their property from the moment of adjudication. Civ. Code, arts. 2353, 3152, 3219, 3153, 3667. Code of Pract. 300, 301, 302, 722. 3 Robinson, 276.

MORPHY, J. The petitioner represents that, in the year 1830, she inherited from the succession of her father. Samuel Harbour, a sum of \$2700, which was received by James S. Willis, her husband, and applied to his own use and benefit. That in consequence of the embarrassed state of his affairs, all the property he possessed has been seized, and is advertised for sale, on the 11th of May, 1843, at the suit of Whiting & Slark. She avers, that she is entitled to a separation of property, and to be paid out of the proceeds of the land and slaves about to be sold, in preference to the seizing creditors. She prays accordingly, that she may be separated of property from her husband; that she may recover against him the sum of \$2700; that the Sheriff may be ordered to retain said amount of the proceeds of the property when sold, and to pay the same to her, in preference to all other demands against her husband. Whiting & Slark answer, denying that the plaintiff has in law or fact, any cause of action or claim against them in the manner and form set forth in her petition. They aver, that the land and slaves seized as the defendant's were on the 11th of May, 1843, adjudicated to Charles Willis, the brother of the plaintiff's husband, for the price of \$5850 cash, under their execution; that by the written consent of the defendant, all the property was sold on his plantation, about fifteen miles from the court house and town of Baton Rouge, and about 11 o'clock, the time specified in the advertisement, without any notice to them, to the officer making the sale, or to the by-standers, of the claim now set up by the plaintiff. That they (the respondents) were represented at the sale, and bid an amount which, by the certificate of mortgages then exhibited, was sufficient to cover prior liens and their execution, so as to entitle them to recover the sum due them in cash. That from the date of the order authorizing the plaintiff to file her opposition, and the time when it was actually filed, to wit, after the officer had left in the morning to make the sale on the plantation, and when neither

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they, the officer making the sale, nor any interested party could be put upon their guard, it is manifest that the object was, if possible, to obtain an unfair and unjust advantage, by inducing them, the respondents, to believe that their bid was sufficient to satisfy their demand in cash; and that the *laches* and bad faith of the plaintiff should not deprive them of the benefit of their execution. There was a judgment below in favor of the plaintiff, from which the seizing creditors have appealed.

The evidence shows, that the share or portion of the petitioner in the succession of her father, Samuel Harbour, amounted to \$2730; that at the probate sale of the estate, in 1830, James S. Willis, her husband, purchased property to the amount of \$5205. and, among other things, the tract of land subsequently seized and sold at the suit of the appellants, and that the defendant signed, jointly with his wife, three receipts to the Probate Judge, for moneys stated to have been received from the estate of Harbour, largely exceeding the portion accruing to her. The Probate Judge, who was examined as a witness, testified that these receipts included, besides the portion of the defendant's wife, moneys accruing to two minor heirs, who were his wards, and that they were signed without any money having been paid over by him to the defendant or his wife. The testimony is not as explicit as could be desired, in relation to the precise manner in which this settlement was made, nor does it account for the notes which the defendant appears to have given for the land, in 1830; yet, upon the whole, it impresses us, as it did the inferior Judge, with the conviction that these receipts were given in payment of what Willis-owed to the estate of his wife's father, and that her hereditary portion, which was included in them, was thus received, and used by him to pay a debt contracted in his own name. As to the notes he may have given for the land, he can hardly be supposed to have signed receipts for moneys not paid to him, without having had these notes either cancelled or returned to him.

It is urged, on the part of the appellants, that the plaintiff's opposition came too late, and could not affect their right to the money levied under their execution; that it became theirs from the moment the adjudication was made; that the proceeds of a sale are not to remain suspended in the hands of the Sheriff until one pre-

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tending to have a privilege on them establishes it by a judgment; and that a wife, who has only a general mortgage, and whose claim is not yet liquidated, should not be permitted to sweep from a judgment creditor the fruits of his labor and diligence, &c. The case of Stafford and Husband v. Dunwoodie, (3 Rob. 276,) to which the counsel has referred us, has no bearing upon the We there held, that the defendant, by his present controversy. seizure, had acquired on the moveables seized a privilege or preference over the wife, because her rights, being merely paraphernal, gave her no privilege on the personal property of her husband. But the property sold in this case consisting of land and slaves, the plaintiff had on them her legal mortgage, which existed long before the appellants had acquired any lien on the property by virtue of their seizure. The only question then which remains, is, whether the plaintiff can enforce her claim, in the manner and form she has thought proper to pursue. to have proceeded under arts. 401, 402 and 403 of the Code of The two first of these provisions treat of persons having privileges or special mortgages, which entitle them to be paid in preference to the party making the seizure. They prescribe the course these persons are to pursue, and declare their absolute right to be paid in preference to the plaintiff in execution; while the last article, which is more particularly applicable to this case, provides, that if the opponent have only a general or legal mortgage on the property seized, the plaintiff or seizing creditor shall be paid in preference, if he prove that the defendant has other property of sufficient value to satisfy the claim of the opponent. The appellants have failed to show that James S. Willis had any property left in his possession, after the seizure of his land and slaves. Morris, the Deputy Sheriff, testifies, that he has had several executions against him for months, and could find no property to satisfy them. He adds, however, that the defendant's father died possessed of a tract of land, situated in the parish of Livingston; but this land is shown to be worth about \$1000, and the co-heirs of the defendant to be eight in number. Even had the defendant accepted the succession, which does not appear, and were it free from debt, his share or portion of it would be clearly insufficient to meet the plaintiff's claim. As to the complaint in relation to

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the time when the opposition was filed, and the injury sustained by the appellants, who allege that, had they had earlier notice of it, they might have secured their debt by making or procuring a higher bid for the property, it can only be said that, admitting this to be the case, the plaintiff's opposition cannot be rejected on that account, if offered in due time, as we believe it was. So long as the money levied under an execution has not been paid over to the seizing creditor, it is not too late to bring forward claims entitled to a preference. The money represents the property of which it is the proceeds, and is subject to the privileges and mortgages which existed on it. Code of Pract. arts. 401, 402, 403. 7 Mart. N. S. 277.

Judgment affirmed.

Succession of Warren C. Whitaker—Robert H. Lewis, Appellant.

Action by a physician for services rendered, and medicines furnished to the deceased. The evidence showed, that the disease for which the latter was treated was incurable, but that a wound received during his illness, was the immediate cause of his death: Held, that the physician was not entitled to a privilege for the amount of his bill; that such a privilege is allowed only for medicines furnished, and services rendered during the last sickness, (C. C. 3158); and that by the last sickness is meant that of which the patient died. C. C. 3166.

APPEAL from the Court of Probates of East Feliciana, Saunders. J.

Z. S. Lyons, for the appellant, contended, that the claim was a privileged one, and that the sickness during which the services were rendered by the appellant, was that contemplated by the Civil Code, arts. 3158, 3166.

Lawson, contra.

MARTIN, J. The appellant complains of a judgment which allows his claim for medical services to the testator, but denies any privilege therefor, the court being of opinion, that the testator died in consequence of having been shot; while the appellant contends, that he died of the sickness during which he was attended by him; and this is the only question which the case pre-

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sents for our solution. The testimony shows, that the testator's disease was such, that the appellant's services could only tend to the mitigation of his sufferings, but could not have prevented a fatal termination. It appears, that the wound which he received from a pistol shot was the immediate cause of his death.

The Civil Code, art. 3158, gives a privilege for all charges of whatever nature, occasioned by the last sickness. If the Code contained no explanation of this article, there is no doubt the appellant would be entitled to the privilege; but art. 3166, informs us, that "the last sickness is considered to be that of which the debtor died." It is, therefore, clear, that the physician has no privilege on the estate of a testator who did not die from sickness; and the appellant's counsel, in his brief, tells us, that "he was shot dead by some unseen and unknown hand."

The Judge of Probates did not err.

Judgment affirmed.

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CHARLES C. S. FARRAR and Wife v. SILVAIN PEYROUX and others.

Action to annul a judgment on the ground of fraud on the part of the plaintiff in claiming more than he was entitled to recover. There was no proof at what time the alleged fraud was discovered: Held, that in the absence of evidence that the fraud was discovered since the date of the original judgment, prescription must be considered to have commenced from the date of the judgment; and that the action is prescribed by one year from that time.

APPEAL from the District Court of West Feliciana, Weems, J. presiding.

Paterson, for the plaintiffs.

Boyle, for the appellants.

Martin, J. The defendants are appellants from a judgment against them in an action of nullity, before the court in which the original judgment had been given. Their reliance, amongst other matters, is on the plea of prescription, more than a twelvementh having elapsed between the rendition of that judgment, and the institution of the present suit to obtain the nullity there-

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of. The plaintiffs have urged, that the defendants cannot avail themselves of the plea of prescription, because, at the inception of the present suit, one year had not elapsed since the discovery by the plaintiffs of the fraud of the defendants, which enables them to seek the nullity of the original judgment.

The plaintiffs have entirely failed in establishing any discovery of the alleged fraud, since the date of the original judgment.

The only fraud which is suggested, is the recovery of a much larger sum than that which the plaintiffs in the present suit conceived the defendants in this action, (the plaintiffs in the original suit,) were entitled to. It is urged, that this recovery could not have been had without a claim therefor to the extent of the judgment obtained; and that a claim for more than the party is entitled to, is a fraud against his adversary. According to the reasoning of the counsel of the present plaintiffs, a judgment for a sum larger than that which is due by the defendant, may always be reviewed by the court which has rendered it, in an action of nullity; because a judgment for more than the party is honestly entitled to, is a fraud. Let this be granted, and if it be admitted that the exhibition of an excessive claim be a fraud, then the knowledge of that claim in the defendant, exists from the moment that he undertakes his defence. That knowledge is anterior to the judgment; and it cannot be assumed that the discovery was posterior. The prescription must, therefore, run from the rendition of the judgment; and it was in the present case acquired before the inception of this suit.

It is, therefore, ordered that the judgment be annulled and reversed, and that the plaintiffs' suit be dismissed, they paying the costs in both courts.

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WILLIAM WHEAT v. THE UNION BANK OF LOUISIANA.

An action to annul a judgment on the ground of fraud must be brought within a year after the discovery of the fraud, (C. P. 613); and where the defendant expressly denies any discovery of fraud within that time, the plaintiff must prove it.

APPEAL from the District Court of St. Helena, Jones, J. Baylies, for the plaintiff.

Halsey for the appellants.

MARTIN, J. The plaintiff obtained an injunction to stay the sale of a tract of land of his, under an execution issued on a judgment obtained by the Bank against Joseph Killian, Hezekiah Wheat, and himself, on an averment that the judgment is an absolute nullity, having been given through fraud and on forged signatures; and he has brought the present suit to have the judgment annulled. The Bank pleaded the general issue; especially denied any fraud, on its part, in obtaining the judgment; and pleaded prescription. It denied that the facts alleged in the plaintiff's petition, came to his knowledge within the year preceding the inception of the present suit; and averred their insufficiency to support the injunction, because they might have been pleaded to the action in which the judgment enjoined was rendered.

There was a verdict for the plaintiff, and the judgment against Killian, Hezekiah Wheat and the plaintiff, so far as it related to the latter, was annulled. The Bank has appealed.

The Code of Practice provides, that when a judgment has been obtained through fraud on the part of the plaintiff, the action to annul it must be brought within the year after the fraud has been discovered. Art. 613. This is the very action which the plaintiff has brought, and on which he seeks the nullity of the judgment, averring that he discovered the fraud within one year.

The Bank expressly denies such discovery within the year. It therefore devolved on the plaintiff to prove it. The judgment was obtained on the 23d of November, 1839; and the plaintiff alleges, that he never had any knowledge of it until the 18th May, 1841. Notice of the judgment appears to have been given by the Sheriff to Killian in person; to Hezekiah Wheat, by leaving a copy of it with his mother; and to the present plaintiff, by

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leaving a copy of it with his wife. All this was done on the 2d of December, 1839, within ten days of the rendition of the judgment. This was a legal notice of the judgment to all; and if the judgment was obtained through the fraud of the Bank on the forgery of their signatures, the notice discovered to them the fraud of the Bank and the forgery of the signatures on the 2d of December, 1839, twenty-one months and twenty-three days before the 25th of October, 1841, the day on which the present suit was instituted, and seventeen months and sixteen days before the 18th of May, 1841, the day on which it is alleged, that the plaintiff was first informed of the judgment, a copy of which had been left with his wife and his mother, (who was the mother of one of his co-defendants,) and personally served on the other. knowledge of both of the plaintiff's co-defendants is not denied; and it is difficult to conclude, that a judgment against the present plaintiff, thus known to four persons intimately connected with him, did not come to his knowledge until almost a year and a The fact, however, has been attempted to be half afterwards. proved by the testimony of a member of the bar, who swears, that he knows that the present plaintiff had no knowledge of the judgment until the 18th May, 1841; and that he is satisfied, that he knew nothing of the judgment until the 18th May, 1841. This is accompanied with an admission that the plaintiff cannot read writing, but can write his own name. The testimony of the member of the bar cannot safely be relied on, as it does not disclose the grounds of his knowledge. In the case of Watson v. McAlister, 7 Mart. 370, we held, that the belief of the witness that the signature is genuine will not make proof of that fact, if he states no ground for his belief, as the having seen the person write, &c.

The witness swears he is satisfied, but does not state the ground of his satisfaction. Indeed, it is very difficult to imagine any proper ground for the knowledge of a negative fact. The gentleman, being a member of the profession, must have been conscious, that if his knowledge resulted from what he had heard the plaintiff say, he deceived the court if he did not disclose that it had no other source, for then his knowledge could not be the ground of

our decision. The evidence of knowledge of the judgment, which results from the return of the Sheriff of the notices served on the three defendants, and from their relation to each other, and to the persons with whom copies were left for the two persons not personally served, in our opinion, greatly outweighs that which results from the testimony of the only witness who has been offered by the plaintiff. The plea of prescription ought to have prevailed.

It is, therefore, ordered, that the judgment be annulled, and reversed, the plaintiff's petition for the nullity of the judgment enjoined dismissed, and the injunction dissolved; and that the defendants recover from the plaintiff twenty per cent, as damages on the amount of the judgment enjoined; and the costs in both courts.

JAMES LYNCH v. JOSEPH BURR.

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Where, by a written agreement entered into at the time of dissolving a partnership, one of the partners who purchased the common stock bound himself to pay all the partnership debts, parol evidence will be inadmissible to prove a guaranty by the other partner, that the debts did not exceed a certain amount. C. C. 2256.

APPEAL from the District Court of the First District, Buchanan, J.

L. C. Duncan, for the appellant.

Lockett and Micou, for the defendant.

MORPHY, J. The petitioner represents, that for the term of eight months previous to the 23d of September, 1837, he had engaged with the defendant in a commercial partnership at Tampa Bay, in Florida; that on that day the partnership was dissolved, and certain articles of dissolution were entered into, whereby the plaintiff was to discharge all the debts due by the firm at Philadelphia, and to pay to the defendant eight thousand dollars in ready money, which sum he has paid; that in consideration thereof, the defendant transferred and conveyed to him all the effects and property of the partnership, real and personal, rights, credits, &c.; and moreover, bound himself as surety for the faith-

ful appropriation of certain sums of money sent by the firm to Joshua Burr, the defendant's brother, and Joseph Burr, Sen., his father, at Philadelphia, to be there used for the benefit of the con-The petitioner alleges, that of the sums thus sent to Philadelphia, six thousand dollars have been appropriated to the individual benefit of the defendant, instead of being, used for the business of the firm, a fact which did not come to the plaintiff's knowledge until the accounts of Joshua Burr and Joseph Burr. Sen., were rendered, which was after the dissolution of the partnership; and that, by reason of such suretyship and misapplication, the defendant has become bound, and is liable to pay to the plaintiff the said amount of six thousand dollars. The petitioner further alleges, that during the partnership, the defendant used partnership property and funds for his individual benefit, to the amount of \$4000, which he has never accounted for, and which he is bound to refund. The petition concludes by praying for a settlement, and for judgment for the sum of \$10,000. swer avers, that when the defendant associated himself with the plaintiff; no special articles of partnership were entered into: that the defendant brought goods, and put into the partnership the sum of \$7195 50, and that the plaintiff put in only \$1936 05: that the partnership was dissolved on the 23d of September. 1837, under articles of dissolution, by which the plaintiff agreed to pay to the defendant \$8000, for his share of profits, and for his interest in the stock of goods, debts, real estate, &c., belonging to the partnership, and assumed to pay the debts due by the firm. The answer denies, that the defendant has received or taken out from the capital a larger sum than he was entitled to, or that any of his individual debts were paid out of the funds of the firm without the knowledge of the plaintiff, the amount of the same having been charged to the defendant in the books of the partnership kept at Tampa Bay, under the care and inspection of the said plaintiff. The answer claims, in reconvention, \$5163 50. for so much paid by the defendant in extinguishment of the Philadelphia debts, which the plaintiff had assumed to pay under the articles of dissolution, and a further sum of \$5000 damages, for the suing out of an attachment in this case, which the defendant avers was an oppressive, malicious and unnecessary proceeding. Vol. VII. 13

intended to vex and harass him, and which has caused him damages to the amount claimed. In a supplemental petition. which makes no mention of the articles of dissolution, the plaintiff sets up a number of claims and charges against the defendant, amounting to about \$70,000, and prays for a general settlement of all the partnership concerns, under an agreement entered into between the parties to that effect, and which was annexed to the Two days after, another supplemental petition was filed, in which the plaintiff prays, that the articles of dissolution may be considered as a part of his petition; that all provisions contained in that instrument may be strictly enforced; and that no credits or charges be allowed contrary to its stipulations, as the agreement to have a general settlement in this suit was made The plaintiff further represents, that in reference to the same. at the time of the dissolution of the partnership, it was highly important for him to know the amount of the debts due in Philadelphia, as the amount of those debts would materially affect the price he was willing to give for the defendant's interest in the concern; that the defendant did know the amount of those debts. having managed that part of their business principally, and having at the time but recently returned from Philadelphia; that he accordingly called for information from the defendant, who stated, that those debts did not exceed \$4500; that with this understanding, he accepted the offer made in the articles of dissolution, bound himself for the debts of the firm in Philadelphia, and paid the defendant the sum of \$8000; that, therefore, the defendant cannot claim credit for sums paid in Philadelphia, to a greater amount than the aforesaid \$4500; and that, if debts to a greater amount than said sum be found to exist, the plaintiff, having assumed the payment of them, is entitled to charge the defendant with the excess. The pleadings close with an answer of the defendant to the two last supplemental petitions. He admits, that the agreement therein referred to for a settlement of accounts. was made in reference to the articles of dissolution, and contemplated only such settlement as could be made under them, and n) other. He further avers, that these articles were entered into fairly and honestly on the part of the defendant, for the express purpose of settling the partnership affairs; that they are final and

conclusive respecting all partnership transactions which had occurred previous to their date; and that the plaintiff has no right to make any demand whatever, on matters not reserved for future settlement by the articles of dissolution.

There was a judgment below, in favor of the defendant and plaintiff in reconvention, for the sum of \$4868 48. The plaintiff has appealed.

The facts of this case are, in substance, that some time in the beginning of 1837, the plaintiff, having obtained a sutler's commission for selling goods to the volunteer troops and others at Fort Brooke, in Florida, entered into a partnership with the defendant, who was a merchant doing business, and enjoying good credit in Philadelphia. 'The purchases were principally made in the latter place by the defendant, Joseph Burr, Senior, his father, and Joshua Burr, his brother, and sent out to the plaintiff, who remained at Tampa Bay, selling the goods, and making remittances to his friends in Philadelphia, from time to time. This partnership lasted about eight months, during which, a large and profitable business appears to have been done. No articles of partnership were drawn up between the parties, and no regular accounts or set of books appear to have been kept.

On the 23d of September, 1837, a dissolution of the partnership was agreed to. The difficulty of making a regular settlement of their affairs probably suggested the proposition made by the defendant, of a sale by one of the partners to the other of his interest in the concern. This proposition was reduced to writing in the form of a give or take offer; and was accepted by the plaintiff, who agreed to become the purchaser of the defendant's interest in the firm, for the sum of \$8000; to pay all the partnership debts owing in Philadelphia and its vicinity, on or before the 5th of April, 1838; and to give bond and security for the fulfilment of this obligation. It was stipulated, that if either party should, upon a careful examination, be found to have more capital in the concern than the other, the same should be made equal by the latter paying such a sum as should make the capital of both It was further agreed, that should J. Lynch become the purchaser, Joseph Burr, Jr., should hold himself accountable to

him for all moneys sent to Philadelphia to his father, or brother, by Burr & Lynch, which might not have been appropriated to the benefit of the firm. The articles of dissolution contain other provisions which we may have occasion to advert to hereafter. In accordance with this agreement, Lynch entered into a bond of \$9000, conditioned for the payment of the Philadelphia debts, with security to the defendant's satisfaction. It appears from the pleadings, that at one time it was contemplated, that a general settlement of all the partnership concerns should take place, but that the idea was abandoned; and the plaintiff himself prayed that the articles of dissolution should be strictly adhered to. Notwithstanding this, he has argued his case, and prepared his evidence, as if the settlement in this suit was to embrace all the affairs of the partnership, without, however, asking to have the articles of dissolution set aside; thus a mass of irrelevant testimony has been admitted under the loose and improper practice too prevalent in our courts, of receiving any evidence offered. subject to all legal exceptions. The articles of dissolution, we think, settle every thing in relation to the transactions of the partnership previous to their date, and leave open only the questions in relation to the misappropriation of the partnership money in Philadelphia, and the inequality of the capitals put in by each partner.

Before drawing our attention to these points, the appellant complained, that the inferior Judge totally disregarded testimony offered to prove a guaranty on the part of the defendant that the Philadelphia debts did not exceed \$4500. The court, in our opinion, did not err. The articles of dissolution, while they oblige the partner who should become the purchaser to assume the partnership debts, do not limit the amount of those debts; and neither the deed of mortgage, nor the bond executed in pursuance of this clause, mention any such condition or restriction. proposition of the defendant was in the form of a give or take offer, and would have bound him to the payment of all the debis in the same manuer as it binds the plaintiff, had he been the purchaser. The plaintiff knew, moreover, from his invoices, what goods had been purchased. He knew how much money had been sent to Philadelphia; and was probably, quite as capable

as the defendant, of estimating the amount of the debts remaining unpaid there. If the funds forwarded had not been faithfully applied, he had guarded against such mis-appropriation. It is worthy of remark, that although all the Philadelphia bills were sent to the plaintiff shortly after the dissolution, this pretended warranty was never set up or mentioned, except in his last supplemental petition, filed about twenty months after the institution of this suit. The rule, besides, is well settled, that parol evidence is inadmissible against or beyond what is contained in a written agreement, or as to what may have been said before, or at the time of making the same, or since. Civ. Code, art. 2256.

The clause in the articles of dissolution of the 23d of September, 1837, for equalizing the capitals of the two partners, refers evidently to the comparative state they were in at that time; for it seemed to be a matter of doubt whether there existed any inequality at all, which could not have been the case had the original capital put in by each partner been in contemplation. The plaintiff, who brought this action on the articles of dissolution, does not complain in his petition of any inequality of capital, nor does he claim any thing by reason of such inequality. This agrees with the defendant's first answer, which, after asserting that the original capital furnished by him amounted to \$7195 05, and that of the plaintiff only to \$1936 05, admits that he did withdraw certain sums charged to him in his account of capital stock, which left the capitals about equal. An account book of the partnership, the only one produced in evidence, appears to have been used by Lynch for his own affairs after the It is blotted and altered in several places, both parties having subsequently made entries in it. So far as its situation in September, 1837, can be ascertained, it shows the original investments to have been as stated above; and the several sums taken by and charged to the defendant, to have amounted to **\$**5335 25.

In addition to the sum of \$1936 05, shown by the account book to have been put in by the plaintiff, he now claims various other sums, which would swell his capital stock to \$4863 05. These items are no where mentioned in the pleadings or the ac-

count book, with the exception of a sum of \$1000, which he entered on the book after the dissolution. This amount is claimed under a pretended agreement, by which the plaintiff was to have this allowance made to him as a part of his capital stock, for his services in obtaining the sutler's commission, under which the partnership transacted their business. The testimony in support of this agreement is rather vague and inconclusive. Had such an understanding existed between the partners, this item would probably have been among the first mentioned in the account book, as forming the plaintiff's investment; but the subsequent entry made in the plaintiff's own hand-writing, mentions this sum not as one due under any express agreement, but as a claim on a quantum meruit. From the entry itself, and all the evidence in the case, we are satisfied, that the original agreement, if any was made at all on this subject, was, that if Lynch, who was without credit to buy goods, could procure a sutler's commission to sell to the Alabama volunteers at Fort Brooke, Burr, Jun. who was doing business, and was in good credit at Philadelphia, would join him and procure a stock of goods, by which alone the appointment would be made valuable. The credit of the one in obtaining the goods, was to be an equivalent for the influence of the other in obtaining the commission. This demand is clearly an after-thought. As to the other claims which are not even mentioned in the account book, they are supported by testimony entirely too vague and unsatisfactory. The claim for \$307, as an amount contributed in merchandize at Tampa Bay. would, however, appear to be proved by the testimony of H. Van Buren, the clerk of the firm, were his statement not shown to have been made in error, by the plaintiff's own entries on the books after the dissolution. From these it appears, that the goods or merchandize spoken of, were the remnants of a small adventure, on joint account, between himself and the defendant, made in October, 1836, amounting to \$951 13. When the partnership was afterwards formed, the remaining goods were mingled with the other merchandize of the new firm; but the plaintiff was credited on his stock account with \$400, and the defendant with \$521 13. These sums, which form the original cost of the goods, to wit, \$951 13, were the very first items entered

on the account book of the partnership, as forming a part of their capital stock. It is evident, then, that the witness was in error in relation to these goods, and the plaintiff cannot have been unaware of such error.

After endeavoring thus to swell by proof, his own investment or capital, the plaintiff has strenuously contested an item of \$3410 claimed by the defendant, and included in his capital stock, which he had alleged amounted to \$7195 50. This item is made up of certain dry goods which the defendant had brought to Tampa Bay from Philadelphia, and which were the balance of his stock in trade in that city before he went into partnership with the plaintiff. It is contended by the latter, that these goods were never brought into the partnership, but remained until the day of the dissolution the property of the defendant, who, when the articles of settlement and dissolution were drawn up, agreed to sell them to the plaintiff, together with his interest in the concern. and that it is for this reason a distinct mention of them is made in that instrument, which mention would have been altogether unnecessary, had they belonged to the partnership. To this it is answered, that the true reason why these goods were specially named in the articles was, that this stock, being in part unsuited to the market and selling at a less profit than the other goods, had been a subject of discussion and dissatisfaction between the partners; and that the defendant, in making his proposition to dissolve, wished to put an end to this, as well as to all other difficulties, and insisted on their being included in the sale as joint stock, thus putting these goods definitively on the footing of capital invested by him. The arguments offered in support of these adverse constructions, are equally plausible, and the evidence contradictory. We think, however, with the inferior Judge, that it preponderates in favor of the defendant's position. When these dry goods arrived at Tampa Bay, it is not shown that a separate account was kept of them; but on the contrary, that they were mingled with the other goods of the firm, were sold as occasion offered in the same manner, and the proceeds of the sales entered in the partnership books without any distinction; that the invoice of these goods was placed in the hands of the plaintiff, with the other invoices of goods as they arrived, and by him repeatedly referred

to for prices; that Lynch never objected to their being sold as joint stock, and that a portion of them had been so sold at the time of the dissolution. The plaintiff has attempted to account for these facts on the ground of distinct purchases of some of these goods by the firm; but no evidence in the record shows how much was so purchased, how much was sold, or how much remained when the partnership was dissolved. But, independent of these facts, which show that this invoice of dry goods was considered and treated by the plaintiff as partnership property, the articles of dissolution can hardly admit of any other construction. Under the give or take offer of Burr, there would have been a sale. whether Lynch had elected to buy or to sell. If instead of buying. Lynch had chosen to sell, how could it have been said that Burr's private property was included in the sale of Lynch's interest in the concern? Besides, if the dry goods are separated from the joint stock, and supposed to be added as private property, and offered in addition to the joint stock, there would not be in the proposition to buy or sell, that equality which is of its essence. Van Buren, one of the clerks of the firm, made a transcript from the partnership book given in evidence, shortly after the dissolu-This transcript, which exhibits the defendant's account of stock, shows his investment to have been \$7195 50, and the sums charged to him to amount to \$5335 25. The contested item of \$3410 was then on the book in plaintiff's possession. to have been blotted out since, on the ground that the entry was made by the defendant a day or two after the dissolution. witness testifies, that he made this copy in the presence of the plaintiff, who knew that it was intended for his partner; that he made no objection to it, but directed that two or three small items should be added to the debit side of the account, thus clearly admitting, at that time, that this invoice of dry goods was a part of defendant's capital. If the \$3410, be stricken out of the defendant's stock account, it makes an inequality in the respective capitals to the whole amount of this large item. As the settlement of the stock account was left open by the articles of dissolution, the plaintiff would surely have made this inequality one of the grounds of his original demand; but he claimed nothing on that score, and never even contradicted the assertion in the defendant's first an-

swer, that his capital stock amounted originally to \$7195 50, although he subsequently thought proper to file two supplemental petitions. We therefore conclude, that the item of \$3410, was correctly admitted below.

The sum of \$5335 25, with which the defendant's stock account is debited, shows, that at the time of the dissolution, his original investment was reduced to \$1860 25, a sum inferior by \$75 75, to that put in by the plaintiff. The amount charged to the defendant on the book, is mainly composed of the several sums of money allowed by the court below as having been paid to, or for the defendant, in Philadelphia, by his brother Joshua Burr, with the partnership funds transmitted to him by the firm, with the exception of an item of \$2200, with which, we think, the defendant is not chargeable. The evidence shows, that this amount only passed through his hands, and was by him applied to the payment of a draft of the firm on Joseph Burr, Sen., for \$3100, in favor of Hart, Labatt & Co., for the purchase of some goods in New Orleans, iu May, 1837. As to the sum of \$500, charged by Joshua Burr, as cash paid to take up an accommodation note of Burr & Lynch held by the Bank of the Northern Liberties in Philadelphia, it was, we think, properly allowed as a claim against the defendant under his warranty, as the note itself, when called for by the plaintiff, was not produced. and no proper evidence was given of its payment. If to this sum be added that of \$75 75, the excess of the plaintiff's capital over that of the defendant, at the time of the dissolution, we find that, in the main action, the defendant stands indebted to his partner in the sum of \$575 75.

The reconventional demand which we will now consider, consists of two small debts of the firm, one of \$108 50, and one of \$55, paid by the defendant since the dissolution; and of a sum of \$5000, which he claims to have paid to his father on the 26th of July, 1838. As to the two small items, there appears to be no dispute. In relation to the other, the evidence shows that, at the time of the dissolution, the account of Joseph Burr, Sen., exhibited a balance against Burr & Lynch of \$8708 90. This account, the correctness of which is fully proved, was sent to New Orleans to be sued on. On the 26th of August, 1838, Burr, Sen., Vol. VII.

wrote to his counsel here, that he had been paid by the defendant \$5000, and directed that credit should be given for that amount. and suit be brought for the balance. 'The only direct and positive evidence of this payment results from the depositions of Burr, Sen., who, it appears was examined by both parties, under sepa-Although his relationship to the defendant rate commissions. renders him incompetent, under art. 2260 of our Code, the plaintiff, by using him as a witness, may perhaps be considered as having waived the objection he might have otherwise made. But even without this testimony, the record presents, we think, sufficient proof of this payment. In March, 1840, long after suit had been brought against Lynch on this account, he paid the balance due on it, \$3708 90; and to prove this payment in the present suit, he offered the testimony of one Jonathan Patterson, who saw it made, together with a receipted account in full of Joseph Burr, Sen., upon which this sum of \$5000 figures, as having been paid by the defendant on the 26th of July, 1838. By thus discharging the balance due on this bill, the plaintiff clearly acknowledged the truth of the several items of debit and credit which it exhibited. An attempt has been made to show that this sum of \$5000 was paid out of the funds of Burr & Lynch, during the existence of the partnership, and not after its dissolution. and with the defendant's own money.

The only evidence offered to this point is the declaration of one David Mordecai, formerly in the employ of the firm, that while the defendant was at Tampa Bay, in May, 1837, he told him he had made large remittances to his agents in Philadelphia. This witness does not recollect the precise amount stated; but says, that he knows it exceeded three thousand dollars: he adds that, to the best of his recollection, it might even have exceeded five thousand dollars. The sworn account of Joshua Burr explains this vague testimony. It shows, that on the 23d of May, and on 9th and 23d June, 1837, he received in Philadelphia through Burr, Sen., remittances from the defendant to an amount exceeding \$3000. The plaintiff's defence to this part of the demand in reconvention, involves an imputation of gross fraud and wilful perjury against the defendant and his father and brother, charges too serious to be supported by the vague recol-

lections of conversations about remittances which had occurred long before. We, therefore, conclude, that in the main action, the plaintiff is entitled to recover \$575 75, which being deducted from the reconventional claim against him of \$5163 50, leaves him indebted to the defendant in the sum of \$4587 75.

It is, therefore, ordered, that the judgment of the District Court be so amended, that the defendant, Joseph Burr, do recover of the plaintiff, James Lynch, the sum of \$458775, instead of \$486848, with costs below; those of this court, to be borne by the appellee.

SAME CASE.—ON A RE-HEARING.

Lockett and Micou, for the defendant, prayed for a re-hearing. Morphy, J. In this case, which turned upon a settlement of partnership accounts between the parties, we came to a result differing but slightly from that of the Judge below. In the petition for a re-hearing, the appellee's counsel has thought proper to remark that, as the surety on an appeal bond is only fixed when the appellant is cast on his appeal, the slightest reduction in the amount of the judgment appealed from will have the effect of discharging the surety, and of leaving to the appellee, in this case, no recourse except that of a suit in a distant State. With considerations of this kind we have nothing to do; nor had they any influence with us when we allowed this re-hearing. We understand, however, the counsel as offering them, not in support of his application, but as an apology he deemed it necessary to make for again calling our attention to this case, notwithstanding the small difference in the amounts of the two judgments. We have found it unnecessary to turn to those parts of the evidence and accounts referred to by the counsel; but have confined our attention to the item of \$500, with which we thought the defendant chargeable under the articles of dissolution, by reason of Joshua Burr's refusal to produce as a voucher, the accommodation note of the firm of Burr & Lynch, alleged to have been taken up. It is urged, that the defendant should not suffer for the improper refusal of Joshua Burr to surrender

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this note, which he perhaps considered it necessary to keep for his own protection, as a voucher for a payment he had made; that he was examined as the witness of the plaintiff, and though he refused to produce the note, he positively swore it had been paid; that the note was not under defendant's control; and that no call was at any time made upon him to produce it. Independently of these reasons, which are not without some force, we find on turning to the account of Joshua Burr, that the firm is yet indebted to him in the sum of \$569 92. It appears to us that, as the defendant is only liable as a warrantor or surety for the faithful appropriation of the funds of the firm transmitted to his brother, Joshua Burr, he should not be liable for this item of \$500, which, if deducted from the balance due to Joshua Burr, would still leave the latter a creditor of the firm in the sum of \$69 92. The plaintiff has it in his power to retain the \$500 out of this balance, until the note is produced, or accounted for to his This view of the defendant's liability in relation to satisfaction. this item, would leave the plaintiff indebted on the reconventional demand in a larger sum than that found by the District Court; but no prayer to amend the judgment appealed from has been made.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

CHARLES MILLS v. MICHAEL WEBBER.

A judgment of nonsuit can, in no case, support the plea of res judicata. The fact that the costs of the action in which a judgment of nonsuit was rendered are unpaid, is only ground for a dilatory exception to protect the defendant from a second action before the costs of the first are paid. But where one claiming property seized under a f. fa. against a third person, opposes the sale, and the Judge, without deciding on the merits of the opposition, merely decrees that the costs of it shall be paid by the opponent, the payment of the costs is a condition precedent to his filing a second opposition, but not to an action by him in another court, against the purchaser at the sheriff's sale, for the restitution of the property and for damages for its detention. C. P. 536.

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APPEAL from the District Court of the First District, Bu-chanan, J.

McHenry, for the appellant.

McCarty and Haynes, for the defendant.

MARTIN, J. The plaintiff is appellant from a judgment sustaining the defendant's exception. The petition charges the defendant with having illegally taken a hydraulic press and articles belonging thereto, the plaintiff's property, and prays for the restitution thereof, and for damages.

The defendant, as an exception to the suit, stated, that he had obtained a judgment against Ware, in the City Court of New Orleans, before Grivot, one of the Associate Justices thereof, under which a writ of fi. fa. was issued, which was levied on the hydraulic press and materials mentioned in the petition as the property of the then defendant, and that the present plaintiff filed an opposition to the sale, claiming the press and materials as his own, which opposition was set aside by the Judge from whose court the fi. fa. was issued, whose judgment, no appeal having been taken therefrom, forms a res judicata, and is a bar to the present suit. The exception also avers, that the costs of the said opposition have not been paid by the present plaintiff, the then opponent.

The Associate Judge did not give judgment on the merits of the opposition; but decreed only, that the costs should be paid by the opponent. This is merely a judgment of nonsuit which the Code of Practice says cannot be pleaded as res judicata, or in bar of another suit for the same cause of action, provided the plaintiff has shown that he has paid the costs of the first suit. This is, perhaps, a negative pregnant with an affirmative, to wit, that the judgment forms a res judicata, and can be pleaded in bar to another suit for the same cause of action, if the plaintiff do not show that he has paid the costs of the first suit.

In the case of *Dicks et al.* v. Cash et al. 8 Mart. N. S. 364, this court held, that the First Judge did not err in overruling the defendant's plea of res judicata resulting from a judgment of nonsuit, on the ground that there was no averment that the plaintiff had not paid the costs of the first suit. In the present case, there is an averment that the costs of the opposition have

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not been paid by the opponent. In the case of *Perrillat* v. *Peuch*, 2 La. 428, we held, that a judgment of nonsuit did not support the plea of *res judicata*; but there was no averment as to the costs of the suit having been paid or unpaid.

In the case of Dicks v. Cash et al. this court considered, after a close examination of the French text of art. 536 of the Code of Practice, that the Legislature did not intend that the judgment of nonsuit should, in any case, support the the plea of res judicata; but that even those cases where the costs of the action in which the judgment of nonsuit was rendered remain unpaid, should afford only a dilatory exception, to protect the defendant from being harassed by a second action, before the costs of the first were paid. We considered the reasoning resulting from the pregnancy of a negative with an affirmative dangerous, and that this argument, contrario sensu, though frequently a correct one in the interpretation of laws, is by no means always conclusive. We still persist in that opinion. The District Court, in our opinion, erred in sustaining the exception of res judicata; but we think, that the payment of the costs of the opposition was only a condition precedent to his filing a second opposition, and not to his instituting a suit in another court against the purchaser of the press at the sheriff's sale, for the restitution of it, and for damages for its detention.

It is, therefore, ordered, that the judgment be annulled and reversed, and that the defendant's exception be overruled, and the case remanded for further proceedings according to law; the defendant and appellee paying the costs of the appeal.

Succession of Segond.

Succession of Theodore Segond—Pierre Sauvé, Curator, Appellant.

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In an action against the curator to recover an amount due by the deceased, plaintiff alleged that the latter had been very careful in keeping his accounts, and that evidence of her demand would be found on his books, or among his papers: Held, that this allegation does not show that the demand was founded on a written contract, nor compel the petitioner to admit the books and papers of the deceased in evidence.

All contracts, not in writing, for the payment of any amount exceeding five hundred dollars, must be proved at least by one credible witness, and corroborating circumstances. C. C. 2257.

Appeal from the Court of Probates of Ascension, Duffel, J. D. Seghers, for the petitioner.

Trudeau, for the appellant.

MARTIN, J. The curator is appellant from a judgment by which the petitioner has recovered the sum of \$1500, with interest, which she alleges was delivered by her to the deceased to keep. The general issue was pleaded, and the bailment of the money was proved by one witness. The counsel for the defence urges, that none of the other witnesses, from whose testimony corroborating circumstances are attempted to be drawn, state anything that relates to the amount of the bailment, and that the Court of Probates erred in admitting the testimony of the only witness who states the specific sum, and in overruling the exceptions thereto, grounded on the allegation that the demand was founded on a written contract. It does not appear to us that the court erred. The petition does not state any written contract, although it suggests, that the deceased, having been very careful in keeping his accounts, evidence of her demand will be found on his books, or among his papers. This circumstance did not compel her to admit the books and papers of the deceased in evidence; nor can it enable her to resist the admission of testimony against her demand, which is not grounded on any writing.

The Civil Code, art. 2257, requires, that all contracts for the payment of money above \$500, shall be proven by at least one credible witness, and other corroborating circumstances. We have here the testimony of one witness, whose credibility is not

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denied; and the only question presented for our solution is, whether there results from the testimony of the three other witnesses introduced by the petitioner, corroborating circumstances sufficiently strong to support the testimony of the only witness who establishes the amount of the demand. We have often said, that the weakest evidence ever received in a court of justice, is the relation by a witness, of a conversation had with an individual dead at the time of the deposition. It might be doubted, though we are not aware that the doubt was ever raised, whether such a relation can be legally received. Confidence in what is spoken under oath, results from the belief, that the witness is restrained from uttering a falsehood, by his apprehension of punishment in the present and the next world. Punishment in this world being more immediate, has, in the opinion of many, more influence on the witness than that in the next, which is more remote, and may be hoped to be averted by repentance, and the indemnification of the party injured. Yet, the witness is not to be sworn if he is shown to doubt that there is another world, in which he is to be called to an account for his misdeeds in the present. A conviction of perjury degrades the culprit from his rank in society, and renders him obnoxious to heavy penalties. Of this, the witness who relates the conversation which he pretends to have had, or who misrepresents, or distorts one which he really had, with an individual now dead, cannot have the least apprehension; for no conviction of perjury can be had without the evidence of two wit-There is, perhaps, an equal objection to the admission of a witness in either case.

In that now under consideration, the most important point is, the specific sum which the deceased had in his hands, belonging to Remy at the time of the conversation related by the witness. On this point, the testimony of the latter derives no support from any corroborating circumstance resulting from the depositions of the three other witnesses introduced by the petitioner. With this view of the case, it becomes our duty to remand it for further evidence, in regard to the amount of the demand.

This renders it necessary to examine a bill of exceptions taken by her counsel, to the admission of Marie Postille's and Pierre Giraud's testimony, as far as it relates to conversations between

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them and the deceased, tending to show that he was under no liability to the petitioner. The pretensions of the counsel for the defence are greatly strengthened by our expression of the reasons which have induced us to remand the case; but the petitioner, who availed herself of the relation of the conversation, in which the deceased established the specific amount of the sum received of her, cannot, with good grace, resist the attempt of the counsel for the defence to give in evidence what the deceased said to the witness introduced against her.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and the case remanded for a new trial, the petitioner paying the costs of the appeal.

SARAH DEEMER v. WILLIAM PORTER.

APPEAL from the Court of Probates of New Orleans, Bermudez. J.

Rousseau, for the plaintiff. Mitchell, for the appellant.

SIMON, J. This suit was brought in the Parish Court against William Porter, in his lifetime, and was, after issue had been joined, subsequently transferred to the court, a qua, and there revived against his testamentary executrix.

The plaintiff represents, that about one year before the institution of the suit, she deposited with the defendant a sum of three hundred dollars for safe keeping, as also a 'arge quantity of furniture, which she sent to his house, and which was there received by him; and that the balance of her furniture, jewelry, &c., was forcibly and fraudulently taken away by him from her dwelling. She annexes a list of all the said goods, chattels and furniture; and prays for a judgment for the sum of \$2046, being the amount or value thereof.

The answer of the defendant admits, that he received from the plaintiff certain household furniture on storage, together with a horse and dray, which he avers he is willing to deliver, on her paying him the sum of \$147, due him for storage of the same, 15

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and for other expenses. He further avers, that it was understood between them, that a final settlement of accounts should be had before delivering back any of the articles, and that the plaintiff owes him \$442 50, as shown by an account filed with his answer.

The testamentary executrix subsequently filed another answer setting forth, that a suit had been brought by one Mrs. Page against the plaintiff, and a judgment rendered therein, on which an execution had been issued which was levied, in the lifetime of the deceased, and after he had joined issue in this suit, by the marshal of the City Court, upon all the property of said plaintiff, then in the hands of the deceased; that the sale thereof was enjoined by the plaintiff, who subsequently took a part of the effects seized into her possession, out of the hands of the marshal, the remainder being in the hands of said marshal subject to her order.

There was judgment below in favor of the plaintiff, for the sum of \$407 50, and the executrix has appealed.

From the evidence contained in the record, it is clear, that the deceased had in his hands a sum of three hundred dollars belonging to the plaintiff. This he acknowledged repeatedly to several witnesses, who all agree upon the fact, that the money was deposited in Porter's hands by the plaintiff, to be by him kept at her disposal. She at divers times, and whilst she was in jail, drew upon him for parts of the amount; but he always refused to pay, admitting that he owed her the amount claimed, but saying that he would not pay until she came out of jail. It is also shown by other witnesses, that the plaintiff, some time previous to putting her money into Porter's hands, had received a sum of \$480 in gold and silver; that she wished one of the witnesses to keep said sum for her; and that this amount proceeded from collections made for her by one of the witnesses.

It is true, we have often said that proof of admissions or declarations made by a party to a third person, by which it is attempted to make him liable, is the weakest of all evidence; and that such proof is extremely dangerous, and should be received with great caution; (1 La. 281. 9 Ib. 561. 11 Ib. 139;) and see the case of the Succession of Segond, just decided, ante, p. 111. But, in this case, the evidence is not limited to the simple admission of the party. This admission or confession made to several witnesses

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at different times, is corroborated by such other circumstances as leave no doubt on our minds of the truth of the fact. The plaintiff was in jail; she had confidence in the deceased; he had consented to become her surety; she had put him in possession of all her furniture and other effects; she wanted some one to keep her money, the same money that she had previously received and offered to another person. Whilst in jail, she drew drafts upon the deceased; and, at different times, and in the presence of divers persons, he repeatedly admitted that he had in his possession \$300, which the plaintiff had deposited in his hands for safe keeping. He had been made the depositary of all her moveable effects. This he also admitted to the same witness who saw him in possession thereof; nay, this is even admitted by the deceased in his answer, in which he claims a sum of \$147 for the storage thereof; and we are unable, under such circumstances, to come to any other conclusion, than that this sum of \$300, together with the other small sums for which judgment was given below for the additional amount of \$107 50, making together the amount of the judgment appealed from, was correctly allowed by the inferior court.

Judgment affirmed.

ANGELIQUE J. V. JACOBS v. GUSTAVE DUCROS.

Citation in an action of nullity must be served on the defendant himself, or the suit will be dismissed. C. P. 610. Service on the attorney of the defendant in the action in which the judgment sought to be annulled was rendered, is insufficient.

Sect. 14 of the act of 16 March, 1826, which provides that where the party to whom notice is to be given, either of a final judgment or other proceeding in the City Court of New Orleans, does not reside within the jurisdiction of the court, and has no attorney in fact, or at law resident therein, execution may be issued, or other proceedings had without notice, does not apply to the citation to a defendant.

One who intends to commence an action against the sheriff of a parish in which there is no ceroner, must provoke the appointment of one, the coroner alone having authority to serve process on the sheriff.

APPEAL from the City Court of New Orleans, Collens, J.

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Greiner, for the plaintiff.

Marsoudet and Pepin, for the appellant.

Martin, J. This is an action of nullity in which the reversal of a judgment of the City Court is sought; and the defendant is appellant from the judgment against him. His counsel relies on an error apparent on the face of the record, to wit, the absence of the service of any citation on him. No such service appears; but the record shows, that the service of the citation was on the attorney of the defendant in the suit in which the judgment sought to be annulled was rendered; and it has been urged, that in the action of nullity the defendant must be cited to appear as in ordinary suits. Code of Pract. art. 610. Now, in ordinary suits, the service of the citation cannot be made on the defendant's attorney, but must be on the defendant himself.

The plaintiff's counsel has sought to take this case out of the general rule, by showing that the defendant is the Sheriff of the parish, and that the Coroner's office being vacant, there was no officer by whom the citation could have been legally served; and we have been referred to the Louisiana Digest, art. 635,* where we find, that when notice is to be given in the City Court of a final judgment or other proceeding therein, to a party who does not reside within its jurisdiction, and has no attorney in fact, or at law, on record, proceedings will continue, as if notice had been given. When the office of Coroner is vacant, the party who intends to institute a suit against the Sheriff must provoke the appointment of a Coroner, who alone has authority to serve process on the Sheriff. It is said, that no one is willing to accept the office of Coroner in the parish of St. Bernard. This is a gratuitous assertion, and quod gratis probatur, gratis negatur. Admitting that it is not very easy to present to the Governor a citizen willing permanently to exercise the functions of Coroner in that parish, it cannot be very difficult to find some one willing to accept the office for the purpose of executing a process, with the intention of resigning the office immediately after. The article from the Louisiana Digest cannot be extended to the citation of

^{*}Sect. 14, act 16 March, 1826. Bullard & Curry's Digest, verbo, Courts, No. 38.

a defendant to be brought into court; and the defendant's counsel has correctly urged that, the citation being the essential ground of all civil actions in ordinary proceedings, any radical irregularity in that formality must vitiate all ulterior proceedings.

It is, therefore, ordered, that the judgment be annulled and reversed; and that the plaintiff's action of nullity for the reversal of the judgment of the City Court, be dismissed, with costs in both courts.

FRANCISCO BRUNETTI V. SUZANNE RAPHAEL BARNARÉ.

Where a debtor of a succession becomes entitled to the succession by inheritance from the heir, his debt will be extinguished by confusion only to the amount remaining after the payment of all the debts of the estate. C. C. 2214. If the debts are unpaid, the executor may recover from the debtor the amount necessary to pay them; or if they have been discharged by advances made by the executor, he may recover from the debtor the amount of such advances, the debt of the latter being extinguished only to the amount coming to him from the succession after the payment of all its debts.

APPEAL from the District Court of the First District, Buckanan, J.

Thielen and Roselius, for the appellant.

Morel, for the defendant.

MORPHY, J. Francisco Brunetti, as testamentary executor of Pierre Raphaël, a free man of color, and as tutor of his daughter, Françoise, offered for sale at public auction, a lot of ground, one undivided half of which belonged to the estate, and the other half to the defendant. The property was adjudicated to the latter for \$6000; and in pursuance of the terms of the sale, she paid for one-half of it \$600 in cash, and gave her four promissory notes for \$600 each, endorsed by Brunetti himself, payable at six, twelve, eighteen and twenty-four months from the 7th of June, 1839, the day of the sale, bearing interest at ten per cent, per annum, from maturity; and secured by a special mortgage on the premises sold. Shortly after the sale, Brunetti filed in the Court of Probates an account of his executorship, showing

that there would be only a balance of \$896 58 in favor of the succession, after the four notes of \$600 had been paid, none of which had then matured; and that he had paid for its account. debts to the amount of \$1503 42. This account was duly homologated on the 13th of August, 1839, by a decree of the Court of Probates. In July, 1840, Françoise Raphaël died, leaving for her only heir and testamentary executrix, the defendant, Suzanne Raphaël Barnabé. The latter accepted the succession, and had an inventory of it made, on which this balance of \$896 58 figures as the first item, being mentioned as due to the deceased, Françoise Raphaël, as sole heir of her father, from whose succession it accrued to her. Before signing the inventory, the defendant declares that she knows of no property, moveable or immoveable, belonging to the deceased, Françoise, except that therein mentioned, and says nothing of the four notes of \$600 each, which she had given for the property she had purchased of the estate of Pierre Raphaël. The present suit is brought by Brunetti as the holder of these notes, which have never been paid or protested, and of another note of \$807 20, also drawn by the defendant, to his order, dated the 22d of July, 1839, payable twelve months after date, with interest at ten per cent, per annum, from maturity, and secured by mortgage on the same piece of property as the other notes. An exception was taken to the petition on the ground, that it does not distinctly declare whether the petitioner sues as testamentary executor of the late Pierre Raphaël, or in his own individual name as the owner of the notes. This exception was overruled by the Judge, who was of opinion, that it was not necessary to allege that the suit was brought in a representative capacity. The defendant then filed her answer, in which she avers, that the plaintiff has no right to sue in his own name for the recovery of the four notes of \$600 each, inasmuch as he received them as testamentary executor of the succession of Pierre Raphael, and has kept them as such, and as tutor of Françoise Raphaël, the daughter and only heir of the deceased. The answer alleges, that these notes or obligations are extinguished by confusion, as the defendant, who was indebted on them, has become a creditor by her acceptance of the succession of Françoise Raphaël; that the separation of patri-

mony has not been asked for by the plaintiff, and cannot now be acted upon, and that the notes have consequently become totally and irrevocably extinct. The answer further represents, that, as relates to the note of \$507 20, the defendant is ready to show by an account settled between herself and Brunetti, as testamentary executor of Pierre Raphaël, that the said obligation is not in favor of Brunetti, or for his personal benefit, but was executed in settlement with and for the benefit of the succession, and that it has also become extinct by confusion.

The Judge below was of opinion, that the four notes of \$600 were extinguished by confusion, and that the executor had only a personal claim against the defendant for \$1503 42, for the debts of the estate of Pierre Raphaël paid by him. He rendered judgment accordingly, for that sum, as a personal debt, with five per cent interest from judicial demand, but recognized the plaintiff's mortgage in relation to the other note of \$807 20. From this judgment the present appeal was taken.

In whatever capacity the plaintiff may be considered to have brought this suit, we are of opinion that, under the circumstances of the case, no confusion took place, at least to the extent contended for by the appellee, and that the mortgage given by the defendant has never been wholly destroyed. Confusion, which is one of the ways in which obligations are extinguished, is defined to be the union, in the same person, of the qualities of debtor and creditor. Civ. Code. art. 2214. As no man can be his own debtor, or his own creditor, the debt is necessarily extinguished; but this happens only when the person who owes the debt becomes a creditor for its whole amount. If he becomes entitled only to a portion of the debt he was owing, it is obvious that there is no extinction by confusion, except as to that portion, and that the surplus continues to be due in the same manner as the whole was due. 2 Pothier, Oblig. Nos. 605, 607, 612. In the present case, Françoise Raphaël, as sole heir of her father, Pierre Raphaël, was entitled only to such an amount of money as would remain after the payment of the debts of the de-That amount is shown, by the executor's account, duly homologated, to have been only \$896 58. She never became the owner of the four notes amounting to \$2400. Had she been

of age, she could not have called upon the executor to surrender them to her, without placing in his hands a sum sufficient to pay the debts of the estate, or his advances to it. When, therefore, the defendant succeeded by inheritance to the rights of Françoise Raphaël, she became entitled only to the sum of 8896 58, and to that amount only did confusion extinguish her debt to the estate of Pierre Raphaël. She remained indebted on her notes and mortgage for the balance now claimed of her by the plaintiff, if he be considered as suing in his representative capacity. If this suit was brought by the plaintiff in his own name, as owner of the notes, and such we apprehend is the true light in which it should be viewed, the result must be the same. Notes, and other such evidences of debt, may be, and very often are, worth less, but never more, than the amount expressed on their face. If an agent entrusted with the collection of a debt receives a note in payment, and settles with his principal in money, the note becomes his property; especially if he takes such note to his own order, when under his instructions he was to have required one satisfactorily endorsed. So, in the present case, Brunetti, who under the terms of sale was to have received from the purchasers endorsed notes, may be considered as having made the debt his own, when he took the defendant's notes to his own order. Had these notes become valueless, wholly or in part, he would undoubtedly have been liable for their amount. He seems to have so viewed his responsibility. He accordingly paid the debts of the succession; and on rendering his accounts, placed these notes among the assets of the estate, and held himself liable for the balance. This appears to have been also the understanding of the defendant herself, for, in July, 1840, when she had an inventory taken of the estate of Françoise Raphaël, whose succession she had accepted, she placed upon it this balance of \$896 58, as due by the plaintiff to her testator; thus ratifying the act by which he had kept the notes for his own account, and acknowledging that her only claim against him, as heir of Françoise Raphaël, was for this amount of money. She appears further to have since paid the plaintiff divers sums of money, which are mentioned in the receipts as money paid for interest due to him. This interest we take to be that which was

running on her notes in the hands of the plaintiff, who had thus become the legal owner of them. She cannot now resist his right to recover on these notes, and the mortgage by which they are secured; but she is entitled to a deduction of \$896 58, the amount due to her by the plaintiff as the balance of his account.

In relation to the note and mortgage for \$807 20, they were both executed in the individual name and on behalf of the plaintiff; and it is not shown that the estate of Pierre Raphaël has any right or interest in them.

It is, therefore, ordered, that the judgment of the District Court be reversed; and that the plaintiff do recover of the defendant the sum of \$2310 62, with interest at the rate of ten per cent, per annum, until paid; on \$303 42, from the 7th of June, 1840; on \$600, from the 7th of December, 1840; on \$600, from the 7th of June, 1841; and on \$807 20, from the 22d of July, 1840, with mortgage on the premises described and referred to in the petition. This judgment to be credited with \$100, paid by the defendant on the 18th of February, 1841; with \$72, paid on the 30th of November, 1841; and with \$50, paid on the 16th of April, 1842.

It is further ordered, that the defendant pay the costs in both courts.

BENJAMIN CROSS v. THE POLICE JURY OF LAFOURCHE IN-TERIOR.

Proceedings of police juries and juries of freeholders, under the act of 12 March, 1818, relative to public roads, involving questions of police rather than of a judicial character, should be sustained unless manifestly unjust.

The second section of the act of 12 March, 1818, which gives the right to any individual dissatisfied with the decision of a jury of freeholders laying out a road through his land, either as to the course of the road, or the damages allowed to him, to appeal to the District Court, does not authorize the appellant, on his single opposition, and without making any other party than the Police Jury, to contest the opening of such road beyond the limits of his own property. Evidence to show that a better route might have been selected beyond his limits, is irrelevant and inadmissible in a proceeding to which the proprietors of the lands, over which the road is to pass are not parties.

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Where on an appeal from the decision of a jury of freeholders establishing a road, under the act of 12 March, 1818, the jury to whom the case is submitted in the District Court, are of opinion, that another route through the lands of the appellant, indicated by him, is practicable and reasonably convenient to the public, and less injurious to the appellant, they may substitute such route for that selected by the jury of freeholders, and order the road to be made along it. Per Curiam:

As a general rule the most direct and best route should be selected; but this rule is subject to exceptious, one of which is, that too much injury should not be inflicted on individuals. Where a direct course would cause great damage, the road should approximate to it as near as it can under all the circumstances.

A witness, under cross-examination, may state matters which, though not directly called for by the question propounded to him, might be brought out by a direct question from the other side.

On an appeal from the decision of a jury of freeholders establishing a road through the lands of the appellant, defendants offered in evidence a petition addressed to them by the former, at a previous period, with parol evidence to show the action on it, and the selection by the appellant, of the route to which defendants consented in their answer: Held, that the evidence was admissible; and that if there had been any change in the property, or in circumstances, calculated to alter his opinion, it was competent for him to show it, and thereby destroy the effect of the evidence.

On an appeal from the decision of a jury of freeholders establishing a road, under the act of 12 March, 1818, the appellant may introduce evidence to prove that a convenient and good road may be laid out through his lands, less injurious than the one proposed by the jury, though such route was not specially indicated in his opposition. So, evidence will be admissible on his part to show, that the construction of the road along another route would cost less than the one designated by the defendants, the law giving to the court and jury to whom the appeal is submitted, a power of revision over the damages as well as the course of the road.

APPEAL from the District Court of Lafourche Interior, Nicholls, J.

GARLAND, J. The Police Jury of the parish of Lafourche Interior, in November, 1842, passed a resolution, directing that a jury of seven freeholders should be appointed, for the purpose of laying out a public road from the bayou Lafourche, "so as to effect a free and easy communication to the bayous Sec, L'Ours and Chackbé," in compliance with the act of the Legislature, passed in 1818, relating to the public roads in the State. B. & C.'s Digest, 737. Acts of 1818, p. 54. The jury being duly qualified, proceeded to discharge the duties imposed on them, and after various examinations of different routes, fixed upon a line for the road, and made their report, which was confirmed by

the Police Jury, and the road ordered to be opened. The complainant being dissatisfied with the decision of the freeholders. both as to the course which the proposed road is to take, and with the damages allowed, appealed to the District Court, as authorized by the second section of the act. He alleges, that the action of the jury is against law and equity. Avers, that a good and practicable road, affording a free and easy communication between the points mentioned, can be had with much less prejudice and damage to himself and other proprietors, of equal convenience to the inhabitants, and at a less expense to the parish. He alleges, that such a road would be preferable to the route selected. He then proceeds to point out three routes, different in some respects from that selected, which will be equally convenient to the public, and less injurious to him. Two of these commence at a different point of departure from that selected by the jury, and follow routes designated, until they come near to the complainant's plantation, through which he points out different courses that should be taken, in order not to pass so directly through his enclosed lands, as the proposed route would do. The third route which he mentions, commences at the point selected by the jury, and follows it until it approaches the land of the complainant, where he asks, that it shall take a different course through his field from that proposed. He alleges, that if any one of the routes proposed by him should be fixed on, it will be more convenient and less injurious to him and others, than that proposed by the jury; that two of them would cause very little expense; but that the third would cause him damage to the amount of \$5000. If the route selected should be insisted on, he avers, that his damage will be \$15,000. He prays for an injunction to prevent the road from being immediately opened; and also for a judgment for increased damages, in case the action of the jury of freeholders shall be approved by the court.

The answer, after a general denial, admits the laying out of the road; its necessity and utility are alleged; assents to a change, which might, perhaps, render it more convenient for the complainant; and then proceeds to aver, that the complainant, when he found that the road must pass through his land, insisted on its passing in a direct line, and that it was at his own sug-

gestion, that the route was fixed in the direction now complained of.

The cause was submitted to a jury, before whom a mass of testimony was introduced. A number of bills of exceptions were taken, to the admission and rejection of testimony.

It appears that there are a number of inhabitants on the bayous Sec, L'Ours and Chackbé, who are from five to ten miles distant from the bayou Lafourche, which is the navigable stream on which their crops must be transported to market, and on the banks of which the court-house of the parish, and the village where these inhabitants trade and transact their business, are situated. There is no public road from these settlements to the bayou Lafourche; and the object is to get one. The necessity for the road is undeniable. The complainant owns a large sugar plantation about four miles from the bayou Lafourche, near to, or on which, is a spot called "the Sycamores," where all admit that the road must pass, for the purpose of avoiding swamps and water-courses, which are difficult to cross. To reach this point, it is necessary to pass over the complainant's land in some direction. lected by the jury of freeholders is nearly in a direct course through the cultivated lands, and divides the tract unequally, putting the sugar house on the smallest portion, and separating it from the main plantation, but not from the other buildings on the The proposed road will run from twenty to thirty arpents through the field and over good ground, and the jury allowed twenty-five dollars for each running arpent, the road to be only thirty feet wide.

On the part of the complainant several witnesses were examined, who were requested by him to view the premises and proposed routes, and they have given their opinions and observations in evidence. These witnesses admit that the proposed route selected by the jury is as good, perhaps better than any other, for the purpose intended; but they say, that it will injure the complainant more than any other. They estimate the damage at a rate far beyond that fixed by the jury, some of them fixing the amount as high as \$8000. The reasons they give for making such an allowance, are not stated with much detail. In fact, they all say, that no estimate of particular items was made; but that a

conclusion was reached by general observation as to the labor necessary to construct new fences, to make new ditches and drains, to remodel the general divisions of the cane field into squares or other figures, the danger of the introduction of the coco grass, and other causes too numerous to be herein fully stated. On the part of the Police Jury, the whole jury of freeholders were examined at great length, as were several other witnesses who were acquainted with the localities. The former persisted in the opinion given in their report, as to the route designated being the best for all concerned, in which they are sustained by other witnesses. They also say, that the compensation allowed, is very sufficient for any injury the complainant may have sustained.

The parol testimony fills upwards of sixty closely written pages. consisting of details as to the elevation of ridges of land, the depth and number of the swamps and bayous, the facilities and difficulties of making roads on the various routes proposed, the interviews and negotiations between the freeholders and the complainant, and many other circumstances, which, if recapitulated, would be unintelligible to any one not acquainted with the locali-No map or diagram comes up with the record, yet references are repeatedly made to lines and courses, bearing to nearly every point of the compass. From the difficulty we have had in understanding and applying the testimony, we can well imagine the embarrassment and difficulty of the Judge and jury, before whom the cause was tried. In a matter involving so many local details, it is impossible for any one who has not himself seen the ground, to form an accurate opinion. Some of the jury who tried the case were probably acquainted with the topography of the proposed routes, as were the witnesses who examined them at the instance of the complainant; but the verdict of seven citizens. themselves owners of real estate, and most of them planters, acting under an oath so strong and solemn as that required of them. ought not to be disregarded except for the most cogent reasons. in a matter to which their particular attention has been drawn. and which it seems they had under consideration for several months.

The jury, after a most tedious trial of nearly two weeks, found a verdict in favor of the complainant, "rejecting and setting aside

the road traced by the jury of freeholders;" whereupon the Judge decreed, that the road traced from the bayou Lafourche across the Bibb plantation, as described in the report of the jury of freeholders, until it leaves the rear of the complainant's plantation, be annulled and set aside, as not conformable to law, and the Police Jury were ordered to desist from opening that portion of the road. From this judgment that body have appealed.

Before proceeding to consider the principles of law, we will state the conclusions drawn from the testimony. It appears, that the complainant is unwilling to have any road through his land at all; but, if it be unavoidable, he wishes to have it placed on ground as little valuable as possible, and to be made so circuitously as not to interfere with his own arrangements. If interfered with, the object then appears to be to make as much money as possible out of the parish. The convenience of the public, and of those citizens who are excluded from a navigable stream, and from communication with their seat of justice and market town, seems to have but little weight.

Our Code provides, that no one shall be divested of his propertv. unless for some purpose of public utility, and on consideration of an equitable indemnity, which includes not only the value of the property, but the damages caused by taking it. Civ. Code, art. 489. But this equitable indemnity does not mean an extravagant allowance, to be made out of the public coffers for imaginary injuries. The ancient laws and usages of the country required of the proprietor of every tract of land, to furnish a road for public use. These have in some degree been modified by our legislation; but the great principle remains at the foundation. that a portion of each individual's private rights must sometimes be yielded for the public good and convenience. A single individual, whose estate is enclosed by others, has a right under articles 695 and 698 of the Code, to claim a passage over the land of his neighbor, upon a proper indemnification. In exercising this right, as little injury as is compatible with the object, must be done; but a practicable passage must be afforded, and a reasonable convenience consulted on both sides. Articles 701 and 703, show that proprietors of lands fronting on a river or stream, are bound to give a road on or near its border, even without compen-

sation; and so says the act of 1818. The necessity for good roads is as important, if not more important, at a distance from the water courses, than on their banks.

We coincide in opinion with the District Judge, that the Legislature has wisely entrusted to the Police Juries of the different parishes, the power of laying out and establishing public roads. None but owners of landed property can be appointed members of the jury to report on the projected route. Their interests and sympathies are generally the same with other land owners. They are sworn to do justice; and while the advantage of the public is to be consulted, they are to do as little injury as possible to individuals. Enclosed and cultivated lands are not to be wantonly entered upon or taken from a proprietor, when a practicable and good road can be had, by taking a different direction. On the other hand enclosed lands are not sacred; and their proprietors have no right to subject the convenience of a community to their caprices or interests, or to compel its members to toil through swamps and across large streams, to construct a road on a circuitous route, which, when finished, will be impracticable during a large portion of the year. The law has also given to every citizen through whose land a road is laid out, a right of appeal to the District Court, either as to the course it is to take, or as to the damages assessed. The supervising power, as to the course of the road, we think ought to be cautiously exercised, as it will most generally involve questions not judicial, but of police; and the proceedings of the jury of freeholders, and of the Police Jury, should be sustained, unless manifestly unjust. If a court and jury undertake to revise them, particularly as to the location of the route, it should only be done upon the most accurate information, obtained by experts properly qualified, accompanied by plans and diagrams, enabling the judicial tribunal to act advisedly. The judgment of a sworn jury, acting upon their own observations, made on the ground, should have much weight, and prevail over the loose opinions of those who incur no responsibility, are not sworn, and make an ex parte examination at the request of an interested person.

The District Judge instructed the jury, that in this case, the complainant had a right to contest with the Police Jury the route

selected before reaching his land, and to show, that another might have been selected on the property of other individuals, equally beneficial to the public, and which, when it reached complainant's property, would be less injurious to him. for this instruction was, that an appeal is allowed, as well in relation to the course the road is to take, as to the damages; and that the party might show, that if the road had commenced at a different point, it need not touch his land at all. In this, we think, the Judge erred; and this error led him very logically into another, which we will hereafter notice. The words of the law are, "that whenever any individual, through whose land a road laid out as aforesaid shall pass, may be dissatisfied with the decision of the freeholders laying out the same, either as to the course the same is to take, or the damages to him assessed," he may appeal, &c. We are unable to see in these words any thing authorizing the complainant to contest the whole line of the road, and to say, that if the freeholders had commenced their operations at a point, two or five miles from the one they did, that he would not have been incommoded or injured, and that the public would have been as well accommodated. Such an interpretation would lead to interminable difficulties, and keep the Police Jury in continual contests in relation to any route that might be selected. Every person on whose land a road may have been laid out, would say, if you had gone on the land of my neighbor, the public convenience would have been as well promoted, and no damage have been done to me. The appellate court and jury sanction this appeal; and when the Police Jury attempt again to make a road on the indicated route, a new opponent presents himself, and the same argument and scene are repeated, with a similar result. We think the complainant must be confined to contesting the route traced through his own land. show one less injurious to himself, practicable, and reasonably convenient, it should be adopted.

The next error in the charge of the Judge, was a consequence of the one just noticed. He told the jury that, if they should think any of the routes indicated by the complainant preferable to the one selected by the jury of freeholders, they had no right to say so, and direct the road to be made on that route, but must

merely find a verdict for the complainant, and reject the road selected. The reason given for this was, that there might be persons interested in contesting this other route, who were not before the court, and that their rights must not be prejudged. Judge said, it would be very convenient if another route could be selected by the court and jury; but that the law was defective in that respect, and nothing could be done. We do not think there is any defect in the law, as long as it is confined to the parties litigant. The error is in the application of it, and in permitting the complainant to travel beyond his own boundaries, and to contest what was properly the business of others, without making them parties. Suppose Bibb to be willing that the road should pass over his land, or, whenever it may be heard, that his opposition to its course be overruled—would it not be strange, after such consent or judgment, that the present complainant should be permitted to say, that the road should not run on the route agreed upon by the parties, or ordered by the court, because if it did, it would reach his land at a point, and consequently pass through it in a direction, more injurious and inconvenient than if another route had been chosen. The effect of the doctrine would be, to subject the public convenience and will to that of a single individual, who may choose to isolate himself, and, at the same time, cut off a whole community from intercourse with their fellow citizens, and deprive them of the facility of getting their produce to market, simply because an individual happens to have possession of one of those ridges or slips of high land so common in the alluvial lands of this State, over which, it is sometimes the case, that the only practicable route can be obtained. This case strongly illustrates the impropriety of permitting a single individual to contest the whole line designated for the road. The plantation of the complainant, as we have stated, is about four miles from the bayou Lafourche; the road is to go a considerable distance beyond his plantation; and no one complains of it. who owns the plantation on the bayou, where the proposed road commences, has also made opposition. The owner or owners of the land between him and the complainant, offer none. Bibb's case does not appear to have been tried at all, yet the jury, under the charge of the Judge, find a verdict setting aside the whole Vol. VII. 17

road, thus virtually trying Bibb's case, although not before them: and also rejecting a great portion of a route which no one opposed, but all approved. The District Judge appears to have discovered the conclusion to which this verdict would lead; and when he gave his judgment on it, only set aside a part of the route, to wit, from the Lafourche to the rear of the complainant's plantation, being silent as to the remainder. Both Bibb, and the Police Jury have a right to have the issues between them tried; and suppose that another jury, after hearing the evidence, had found that Bibb had no reason to complain, and had set aside his opposition, in what position would the case be? There would be a verdict against Bibb, and, possibly, from the evidence, a correct one; and we should have it nullified by one in favor of the complainant, who was no party to that proceeding. The judgments would thus contradict each other; but if each one be confined to the limits of his own property, or all be made parties when it is attempted to go beyond it, no such result would probably occur.

The Judge should, in our opinion, have told the jury that the complainant, upon his single opposition, without making any other party than the Police Jury, must be confined to contesting the opening of the proposed road within his own limits; that it was not competent for him to indicate or select routes on the lands of others, without bringing them before the court. upon the issues made, it was competent for the complainant to point out any one or more routes across his plantation, reasonably convenient to the public and practicable, and less injurious to himself, and if the jury should so find, that such other route should be substituted for that selected by the jury of freeholders, and the road made on it. That, as a general rule, the most direct and best route should be selected; but that this rule is subject to exceptions, one of which is, that too much injury is not to be inflicted on private individuals. That, therefore, where a direct course would cause great damage, the road should approximate to it as near as it can, under all the circumstances.

With our views of the case, we think it should be remanded for a new trial; and this makes it necessary that we should decide upon the bills of exceptions.

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The first is, to admitting the complainant to give in evidence the opposition made by Bibb, to the road being opened through his land. The Judge states, that he admitted it "to prove rem ipsam," and also to show, that other persons contested the route selected by the freeholders. The counsel for the Police Jury excepted to the admission of the document; but, subject to his exception, admitted that Bibb had taken an appeal from the location of the road on his upper line, the distance of eighty arpents, that is, over his own land. This document does not come up with the record, and we cannot say whether the Judge was correct or not; but if the only object of introducing the paper was to prove its existence, and that a similar suit was pending in the name of another person, we cannot now see what influence it could have had on the jury.

The next bill was taken by the counsel of the Police Jury, to the refusal of the Judge to permit Beatty, a witness for that body, who was under cross-examination, to answer as fully as he desired to a question propounded to him. The question was, would the complainant have to haul his wood or cane along the road proposed? The witness answered, that the greatest part of the cane would have to be hauled across the road, to get to the sugar house, and that neither it, nor the wood, would necessarily be hauled on the proposed road. The witness then proposed to add: "that it would then be necessary for him, (Cross) either to pursue a circuitous route for hauling his sugar over a bad road, or else to haul it over the middle of his plantation, the carts passing and re-passing over the public road, with coco; and that from his knowledge of the plantation, it would be Cross' interest to pass through the field instead of along this circuitous route." This part of the answer quoted was objected to by the complainant. as not responsive to, nor necessarily connected with the question. The court rejected it, saying, if it were legal testimony, it could be elicited by a direct question put by the counsel of the Police Jury; but that it was not connected with or responsive to the We think the court erred in rejecting the answer. The object of the testimony previously submitted, was to show, that the proposed road would be of little or no service to Cross in hauling his cane and firewood; and the object of the witness,

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who was one of the jury of freeholders, seems to have been to show, that although the road was not indispensable for the particular purpose mentioned, yet that, for another very important one, it would be of service to him. The answer was perhaps not directly called for by the words of the question; but when we consider the object which the party had in view when he asked it, the fact of the witness being under cross-examination, where something more of latitude is allowed than in a direct examination, and the suggestion of the Judge that a direct question from the other side might bring out the same reply, we do not see that any positive rule of evidence has been violated. It seems rather a question of time—at whose instance the answer should be given, than one of law; and, under the circumstances, it ought not to have been withheld from the jury.

The next bill of exceptions was taken by the Police Jury. They offered as evidence, a petition presented by the complainant, in 1841, to the Police Jury, supported by parol testimony to show the action of a committee on it, and the selection by the complainant, at that time, of the road now consented to in the The latter objected to its introduction, and the court sustained the objection, saying, that the only questions before the court were the direction of the road and the damages; that what the complainant might have thought advantageous in 1841, he might not consider so in 1843; that a change of position in his property, and other circumstances, may have operated a change of opinion in him. We think the Judge again erred. The evidence was certainly important upon the question of damages, and also upon that of the direction of the road; for the court and jury certainly had a right to alter it within complainant's limits, more particularly as the Police Jury consented. If there has been any change in the property or circumstances, it is competent for the complainant to show it, and thus destroy the effect of the evidence.

The next bill of exceptions was taken by the counsel for the complainant, to the opinion of the court rejecting a question put to a witness named Navarre. He was asked if a better road could not be obtained than that laid out by the Police Jury, by starting at ten arpents on the western line from the southwestern

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corner, thence northeast to the Sycamores? The objection was, that this was designating a route not mentioned in the opposition, and was taking the Police Jury by surprise. From the terms of the question we infer the whole route mentioned in it, is within, or on the complainant's boundaries. If so, we think the Judge erred, as we believe it competent for the complainant to prove that anywhere within his limits a convenient and good road can be had less injurious to him than the one selected, without specially indicating the route in his opposition; but the court, and jury should be careful in weighing such testimony, and if necessary to elicit the truth, should have an examination made by competent persons.

The next bill of exceptions was taken by the Police Jury, to the decision of the Judge permitting evidence to go to the jury, as to whether a better road could or could not have been obtained, had the jury of freeholders commenced at a different point on the Lafourche, and taken a different course over the lands of others. This bill covers all the evidence of that description, and we have expressed an opinion upon the point in our comments on the charge of the Judge to the jury. We think he should have rejected all such evidence, unless the proprietors of the lands over which the new routes pass, were parties. Then it might be proper; and upon hearing all interested, the appellate tribunal could advisedly carry the law into effect, by changing the route if it were deemed necessary.

The next bill of exceptions was also taken by the Police Jury to the refusal of the Judge to permit George S. Guion, to answer a question propounded to him in relation to the different routes through the complainant's plantation. The witness had been asked, and had given his opinion upon a variety of matters connected with this controversy. He was asked to give another, which we think ought to have been permitted, and that its effect should have been left to the jury.

The next bill of exceptions was taken by the counsel for the Police Jury, who objected to all evidence going to show that any other route would cost less than the one designated by them, as it was a question which concerned only the public and themselves, and the complainant had no right to inquire into it. The Judge

admitted the testimony, and we are of opinion that he did not err. The law gives the court and jury a power of revision, as well over the damages as the course of the road; and all proper testimony to enable them to exercise it was admissible.

The last bill is disposed of, in our decision in relation to the charge of the Judge to the jury.

It is, therefore, ordered, that the judgment rendered herein be annulled and reversed, the verdict of the jury set aside, and the case remanded for a new trial, with directions to the Judge to charge the jury as herein stated, and in the reception and rejection of evidence to be governed by the principles and directions stated in this opinion, and in other respects to proceed according to law; the appellee paying the costs of this appeal.

Stevens and Nicholls, for the complainant.

Beatty and Thibodeaux, contra.

CHARLES M. RANDALL v. JOHN PARKISON, Sheriff.

A sheriff who pays over money in violation of an injunction served upon him, will be responsible to the plaintiff in the injunction for the amount.

APPEAL from the District Court of West Feliciana, Johnson, J. Randall, pro se.

Lobdell, for the appellant.

Simon, J. In consequence of the judgment rendered in this suit by the District Court, perpetuating the plaintiff's injunction, and ordering the proceeds of certain property described in his petition, together with the revenues arising therefrom that may be, or may hereafter come into the hands of the Sheriff, or so much thereof as may be necessary to satisfy his claim, to be first paid to the plaintiff in discharge thereof; which judgment was subsequently affirmed by this court, in March, 1841, (see 17 La. 273,) the plaintiff took a rule on the Sheriff, to show cause why he should not account for and pay over to him all the revenues and rent which came into his hands, arising from the property under seizure, in pursuauce of said judgments.

In answer to the rule the Sheriff states, that he received his

appointment as Sheriff, in June, 1834; that, at that time, the property was hired out to one Dobbs for \$225, for eleven months of the year 1834, which rent he, the Sheriff, received; that the same property was hired out in 1835 and 1836 to one Low, for \$300 per annum, out of which, he, said Sheriff, received \$448, making the whole amount by him collected, \$723, which, after deducting several small sums paid out for taxes, &c., left in his hands a balance of \$577 86 for the rents of the said property, which, he further alleges, were received by him in the suit of the Bank of Louisiana v. Edm. Munroe, and which he paid over to the said Bank, as it was his duty to do, after the dissolution of the injunction sued out by McMicken. 10 La. 135. further avers that, in proceeding to make the balance or remainder of the debts due to the plaintiffs, the Bank of Louisiana, by a sale of the property, he was enjoined from proceeding with the said sale, on the 21st of February, 1837, by the plaintiff in this suit; that at the time this injunction was served upon him, he had already paid over the balance to the Bank; that the rents of 1837 were expended by the lessee in repairs of the buildings; and that the rent of 1833, and up to the date of the sale of the property under the judgment for the benefit of the plaintiff, Randall, has been held and retained by the lessee.

There was judgment below in favor of the plaintiff against the Sheriff for the sum of \$577 86, the balance acknowledged to have been received by him, whilst the property was under seizure in his hands; and from this judgment the Sheriff has appealed.

It is perfectly clear that, under the judgment above referred to, subsequently affirmed by this court, the plaintiff was entitled to demand of the Sheriff the amount of the revenues by him collected, which were, or ought to have been in his hands, at the time that the injunction sued out by plaintiff was perpetuated, including therein the revenues which the Sheriff had in his hands at the time that the plaintiff's injunction was served upon, or made known to him in such manner as to authorize him to arrest the proceedings complained of. From that moment the Sheriff was bound, not only to abstain from proceeding to the sale of the property under seizure, but also to keep in his possession and subject to the order of the court, all the moneys by him collected, as

proceeding from the revenues of the said property. The question then presents itself: Had the plaintiff's injunction been served upon, or made known to the Sheriff, previous to his paying over the amount claimed to the Bank of Louisiana?

It appears from the facts stated in our decision, (17 La. 273,) that the property upon which both parties pretended to have a mortgage, and which had been seized and advertised for sale by the defendant as Sheriff, was to be sold on the 20th of February, 1837; and it was for the purpose of arresting said sale, as well as to prevent the paying over of the revenues to the Bank, that the injunction was obtained and sued out. It is true, the record does not show at what time the injunction was issued; (the writ as found in the record bears no date;) and it does not appear that it ever was served upon the Sheriff, except from his return, dated 24th February, 1837, which states, that "further proceedings on this writ are stayed by injunction," referring to an order of the District Court thereto attached. But it is equally true, that the Sheriff intended, and was to sell the property on the 20th day of February, 1837; and that it was his duty to execute his writ on that day, unless prevented by an injunction issued by the court which granted the original order of seizure and sale. The property seized was not sold on the 20th of February, as advertised: the injunction obtained by the plaintiff, Randall, had its effect; and the necessary inference from this fact is, that the sale did not take place, because the Sheriff had either been previously served with the writ of injunction, or had been informed of its having been sued out, in such manner as to consider himself sufficiently authorized to suspend the proceedings. The Sheriff was bound to obey the order of the court in extenso, from the moment that he was made aware of its existence; and he had no right to obev a part of it, and disregard that part which related to his not parting with the moneys he had then in his hands, proceeding from the collection of the revenues of the property seized. We must, therefore, consider that on, or previously to the 20th of February. 1837, the Sheriff had received sufficient notice of the injunction and was bound to obev it.

Now, it appears from the receipt of the cashier of the Bank of Louisiana, filed with the Sheriff's return, that the amount in dis-

pute was paid over to him by the Sheriff, on the 21st of February, 1837. This is the date of the receipt, which includes not only the sum of \$577 86, paid by the defendant, but also that of \$312 50, received of M. Courtney, the defendant's predecessor in office; and which latter amount also proceeded from the revenues of the property, previously collected by the former Sheriff.

From the above facts and circumstances it is manifest, that the payment made by the defendant on the 21st of February, was made contrary to and in disobedience of the same injunction, to a part of which he had conformed the day before; and we agree with the Judge, a quo, in the opinion, that such payment was by him made at his peril, and that he is bound to pay to the plaintiff in the injunction the sum of money which he, the Sheriff, had in his hands, at the time that it was issued, and which he had been enjoined to keep until the further order of the court.

As to the sum of \$312 50, which the appellee prays in his answer may be awarded to him, in addition to the amount which was allowed him in the court below, we think he is not entitled This sum had remained in the hands of Courtney, the defendant's predecessor in office, until the 21st of February, 1837. when it was paid over by him to the Bank of Louisiana. Nothing shows that this amount ever came into the hands of the appellant, who cannot be made responsible for the acts of his predecessor, and who was not bound to instruct him how to act. The receipt is given for said amount, as received of M. Courtney, late Sheriff; and if it was paid over to the Bank through the hands of the appellant, it was necessary to have proved it on the trial; we cannot presume it. Every Sheriff stands responsible for his own individual acts. He has nothing to ask of his predecessor, unless ordered to do so by the court, or in the cases provided for by law.

Judgment affirmed.

Succession of William Kendrick—Rebecca Davis and others, Appellants.

The account rendered by an administratrix should show that everything on the inventory has been sold or otherwise accounted for, or it should not be homologated.

Notice to the parties interested must be given before any order can be made homologating a *tableau* of distribution filed by an administratrix, and directing the debts of the succession to be paid conformably thereto.

A prayer for the removal of an administratrix, presented for the first time on an application for a new trial, after judgment overruling an opposition to an account filed by her, is too late. To notice such a prayer on appeal, no issue thereon having been made or tried below, would be to assume original jurisdiction.

Where opposition is made to the account presented by an administratrix, the items objected to must be specified, and the grounds of objection briefly and clearly stated, that she may have full notice there of.

On a prayer for the removal of an administratrix the grounds of the application must be stated that she may have notice thereof.

APPEAL from the Court of Probates of St. Helena, S. Leonard, J.

Sheafe and J. P. Bullard, for the appellants.

Davidson, Lawson and Baylies, for the administratrix.

GARLAND, J. William Kendrick died in the early part of the year 1838, and some short time thereafter his widow was appointed administratrix of the estate. Inventories of the property were made in the months of March and July of that year. The succession was composed of lands near, and town lots in Greensburg, a number of slaves, stock of horses and cattle, with household furniture, plantation utensils, and other articles, a quantity of cotton, and debts owing by different persons. In the month of July, 1838, public sales of all the property were made, amounting to about \$30,000, but upon what terms of credit the record does not inform us, notes having been taken from the purchasers to secure the price, none of which are exhibited; we, therefore, cannot tell when they became due, nor what rate of interest they About two years after the sale, the administratrix, not having presented any account, proceedings were commenced by some of the heirs, to have her removed from office; which case was before us two years since. 1 Rob. 402. On the 17th August, 1840,

pending the proceedings for her removal from office, she presented a petition to the Probate Court, in which she alludes to the proceedings to remove her, and declares that she has no objection to rendering an account, nor to stating the progress made in the settlement of the succession, which she avers is not completed. With this petition an account or statement was presented, in which she charges herself with a sum of money on hand at the death of her husband; also, with a number of notes of different individuals, which, from a comparison with the procès-verbal of the sale, we think were probably given for purchases of property. She also represents that there are a number of notes and a small amount in cash, in the hands of the Probate Judge, among which are her own notes for \$6824, being, as would appear from the proces-verbal aforesaid, the amount of her own purchases at the sale. Of the proceeds of the thirteen bales of cotton mentioned in the inventory, or of the amount collected on the notes mentioned in it, or of the progress made in endeavoring to collect them, or of the interest received or accruing on the notes given for purchases at the sale, she gives no account; nor can it be ascertained, except by comparing, with much trouble, the debit and credit sides of the account, from whom any amount has been collected; and there are no data to show the date or specific amount of any collection made by her. She proceeds to give herself credit for various payments made, or alleged to have been made, in money, or by transferring notes held by her, or by giving her own notes in place of those owing by the deceased; and then credits herself with all the notes uncollected, with which she had charged herself, among which her own notes are returned as uncollected, as well as those in the hands of the Probate Judge. The cash in his hands is also placed to her credit. It is asked that, after the proper notices, this account may be homologated and approved.

To the homologation of this account, several of the beneficiary heirs who were present, and the attorney for those who are absent, made opposition:

1st. Because the account does not show the amount of the inventory, nor the excess or deficiency of the sale of the property compared with it.

- 2d. Because the administratrix has not accounted for the full amount received, and the account is not a full and fair one of her administration.
- 3d. Because the debts purporting to have been paid, had not previously been placed on a *tableau* or list according to their rank and privileges, and presented to the Court of Probates for approval and an order to pay them.
- 4th. The opponents object specially to each item of the account, and to the form and manner in which they are set forth.
- 5th. Because the amount due to the succession had not been collected, nor any sufficient reason given why the same had not been done and the creditors paid.

In the month of April or May, 1843, (no proceedings having been had on the preceding opposition to the account rendered,) the administratrix presented what is called a supplemental account to that previously filed. She reverses the order of stating her management of the estate in this document, and commences, as she should properly, by charging the estate with the sums she has paid for it, and then giving it credit for the sums she has collected on account. No date for any debt or credit is given, nor any reference to vouchers, by number or otherwise, made. With this paper a petition was presented, praying that it might be homologated and approved. To this prayer opposition was made by the same parties, for reasons almost identical with those assigned for the opposition to the first account; and for the additional one, that no distinction is made between the community property and that which belonged to the deceased previously to his marriage.

On these accounts and oppositions the parties went to trial. A number of notes, accounts, receipts and other vouchers were presented in evidence, all of which were numbered; but as there are no corresponding numbers in either account, and no date to the items in the second, it is difficult to make an accurate investigation of the application and validity of the documents. A great deal of parol evidence was also received in support of different charges and payments, and as to the disposition made of the property; but it is almost impossible to make it intelligible to any one except by re-stating the whole account, and appending a

commentary upon each item; and as the opponents have not set forth their special objection to each or any one item, the difficulty of deciding the cause is much increased. Among the documents filed, there is a tableau or statement of the debts, showing their character and privilege, amounts, &c., which was presented to the Probate Judge on the 7th May, 1839, and a supplement thereto presented on the 30th of November, 1841. With each of these documents a petition was presented, asking that notice might be given of their having been filed, and a call made on all interested to oppose their homologation if they wished so to do, and praying for authority to pay the debts according to them. each of these applications a judgment, or order was given by the Judge, directing and authorizing payments to be made in conformity with these tableaux. In the judgments it is stated, that the legal notices have been given, and that no opposition had been made. From them, there has been no appeal. All of the items to which the opponents have specially called our attention, are set forth in one or the other of these tableaux, and were approved and ordered to be paid by the Judge.

The Judge of Probates, after hearing the parties, decided that the administratrix had acted correctly, and properly accounted for every thing, and therefore homologated and approved her accounts, and dismissed the oppositions at the cost of the estate. The opponents made application for a new trial on various grounds, concluding by alleging, that a just and full account had not been rendered; wherefore they asked, that the administratrix might be dismissed from office, be condemned to pay ten per cent interest per annum on whatever sum may be owing by her, and that she may be deprived of her commissions on the amount administered. Their application was overruled, and the opponents have appealed.

In this court, the opponents have insisted on all their grounds of opposition taken below; also on their demand made after judgment, that the administratrix should be removed from the trust she holds, that she be deprived of her commissions, and condemned to pay interest as fixed by law.

As to the first ground of opposition: It is clear that there is no statement of any difference between the inventory and the amount

of the sale; nor are we aware that it is specially required to be stated, in the particular mode indicated by the objection. The account should show, that every thing on the inventory had been sold or otherwise accounted for; and that is possibly what the opponents wanted. In this instance it does not show what has become of all the property mentioned in the inventory, to wit, thirteen bales of cotton said to have been sent to market, and also other sums owing to the deceased. We, therefore, think that the Judge erred in overruling this ground of opposition.

We think he also erred in overruling the second ground of opposition. The accounts do not exhibit a full and fair account of the administration. A portion of the property is not accounted for on the face of the account; and it has been necessary to resort to parol evidence and written documents, to show what has become of it; and even then, the explanation has not been very satisfactory.

The third ground of objection is met by the production of a tableau or statement of debts, with a supplement thereto, showing the amount of the debts, with their respective privileges, and the accompanying petitions praying for their homologation, and for an order of the court to pay conformably therewith. No opposition appears to have been made to these prayers, and judgments were entered in conformity thereto, the Judge stating in the judgment, that notice had been given in conformity to law, of the petitions and tableau having been filed, and that, after the legal delays, no opposition had been made. In the court below, the objection as to want of notice does not seem to have been raised; or, at least, it was considered of very little importance. In view of some of the questions raised in this case, we think it a matter of considerable consequence; and we will not decide finally on several questions, until it can be ascertained whether legal notices were given or not.

Under the fourth objection, the counsel for the opponents have selected various items, to which special exception is taken. The principal of these is an allowance of \$1800 to two members of the bar, for professional services rendered to the administratrix in various suits, for responsibilities incurred, and for advice upon various subjects. This allowance is about six per cent on the

whole amount of the estate, and will, with other charges, make the expenses of administration enormous. As the questions are now presented to us, we do not feel at liberty to investigate them, as we believe that all the claims objected to were on the list or tableau of debts presented to the Probate Court, approved by it and ordered to be paid. From its decree no appeal was taken; and if due notice was given of the filing of these tableaux or lists of claims on the estate, and no opposition was made to them by the heirs, it may be questionable whether the administratrix can be made responsible, having paid in obedience to the order of the court. This question we shall not decide, until we have all the facts before us.

An examination of the fifth ground of opposition satisfies us, that there has been great delay, if not actual and culpable negligence in administering the estate. The succession has been opened about six years, and is yet not more than half settled. Large debts seem to be due to the estate for purchases of properperty made in 1838, and no diligence or serious effort seems to have been used to collect them. The administratrix represents the debt owing by herself as uncollected, without its appearing that the succession is indebted to her in any sum whatever; and it is averred, that creditors have not been paid, in consequence whereof the estate is burdened with interest and costs, and that no satisfactory reason is given for such great delay. Had the application for the removal of the administratrix been made previous to the trial below, and an issue been made on it, we do not well see how we could have retained her. When the case in 1 Rob. 402, was before us, the facts were not nearly so strongly presented as they now are. Such unaccountable delay and apparent negligence will not receive the least countenance from this court.

The application, after judgment, on the motion for a new trial, to remove the administratrix from office, was in our opinion, made too late. No such issue had been made or tried, and it would, on our part, be assuming original jurisdiction, if we were to act on it now.

Justice to all parties will, we think, be best promoted by remanding this cause for a new trial. It can then be ascertained

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whether notices were legally given of the filing of the tableaux or lists of debts, previously to their being approved and ordered to be paid. The administratrix must then file her accounts, so as to show the amount of the inventory and sale, and also an account for every article of property and every debt mentioned on the inventory, or the proceeds thereof. Her account must also show how much she has received on account of the estate, from whom, and for what, with the date and other necessary information. or references thereto. She must also show how much has been paid, to whom, the date, and refer to the voucher or evidence to sustain the charge, distinguishing how much has been paid as principal, and how much as interest: nor can she be permitted to credit herself with the amount of uncollected debts, unless due diligence in endeavoring to collect them is shown. and full exhibition must be made, and all the property accounted for, conformably to law. The opponents must also specify the items to which objections are, or may be made, with a brief and clear statement of such objections, that the administratrix may have full notice thereof, and also of the reasons why she should not be continued in the exercise of her functions.

The judgment of the Probate Court is, therefore, annulled and reversed, and it is ordered, that this cause be remanded for a new trial, with directions to the Judge to proceed in accordance with the directions and principles herein stated, and in other respects according to law; the appellee paying the costs of this appeal.

BAILEY D. CHANEY, Administrator of James J. Chaney, v. WIL-LIAM M. GRAY and another.

Lands belonging to a succession, though situated in another parish, may be sold by the probate judge of the parish in which the succession is opened.

Appeal from the District Court of East Feliciana, Johnson, J. Z. S. Lyons, for the plaintiff.

J. P. Bullard, for the appellants.

MARTIN, J. The plaintiff, administrator of James J. Chaney, deceased, brought this suit on a note given by the defendants to

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his intestate. They admitted their signatures, and pleaded, that the note sued upon was given for the price of a tract of land purchased by them from the intestate, who engaged to furnish them with such a title as would enable them to obtain money from the Bank at Feliciana, by the mortgage of the land. They allege that in order to effect this, it became necessary to procure a sale under an order of the Court of Probates, which was accordingly made, and the land adjudicated to them; that they, thereupon, solicited a loan from the said Bank, which was refused, on the ground that the title was defective, as it did not convey the interest of the minor children of the intestate, the land being community property between the intestate and his minor children, as heirs of his deceased wife, their mother; and they pleaded in bar this defect in the title, to wit, that the land is situated in the parish of East Feliciana, while the sale was made in that of West There was judgment against the defendants, and they appealed, after an unsuccessful attempt to obtain a new trial, The appellants' counsel has contended, that a Parish Judge, as ex officio Judge of Probates and auctioneer, has no right to sell land lying in another parish: but, he has admitted that he knows of no positive legislation, nor of any adjudged case which he can adduce in support of his position; and that, in the absence of any authority of this kind, courts are directed by the Civil Code, art. 21, to decide according to equity, and that an appeal is to be made to natural law and reason, or received usages. He also admits, that no instance can be adduced of the judicial sale of land taking place in any other parish than that in which it is He contends, that the law requires writs of fi. fa. to be directed to the Sheriff of the parish in which the land sought to be sold is situated, and that inventories are to be taken by the Judge of the parish in which the property so inventoried is found. The plaintiff's counsel has, however, urged, that sales of land by the Court of Probates in which the mortuary proceedings are carried on, are not uncommon, even in cases where the land lies in another parish; but no special instance has been adduced.

After the most mature deliberation, we are of opinion, that the District Court did not err in concluding that the danger of eviction, of which the defendant's counsel complains, was not such Vol. VII.

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as to induce the court even to require that the administrator should give security for refunding the price, much less to decree the return of the note.

Judgment affirmed.

AIMÉE MISHON v. CATHARINE BEIN and Husband.

Where one to whom property is bequeathed in case of her surviving a certain person, dies before the latter, the legacy will be without effect. C. C. 1691.

To ascertain the intention of the testator the different clauses of a will must be construed with reference to each other. C. C. 1705, 1706.

APPEAL from the District Court of the First District, Buckanan, J.

Warfield, for the appellant.

Wray, for the defendants.

Morel, for a party cited in warranty.

Morphy, J. This appeal is taken from a judgment of non-suit, rendered in a petitory action brought to recover the possession of a slave held by the defendant, Catharine Bein, under a claim of conveyance from one Francis Lockwood. The petitioner claims as usufructuary, under the will of Jacob Manumishon, a free man of color, to whom the slave formerly belonged, and also as proprietor by inheritance from her daughter, Maria, the wife of said Francis Lockwood, who and her husband were, under the same will, the universal legatees of the testator. The case turns upon the construction to be put upon the fifth clause of the will of Manumishon; but to be properly understood, it must be taken in connection with the two preceding clauses. They are as follows, to wit:

"Third. I give, devise and bequeath, to Aimée, my faithful and beloved friend, whom I emancipated twenty years ago, the premises in which I now reside in Magazine street, No. 244, in the city of New Orleans, for and during the term of her natural life, with all interests, rents, issues and profits, that may arise therefrom, to her own use and benefit.

"Fourth. Then I give, devise and bequeath, to Maria, her

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daughter, wife of Francis Lockwood, living in the said city, and pursuing the business of a stevedore, on the levée in the said city, all the aforesaid premises and appurtenances in fee simple, to her own use and benefit forever.

"Fifth. All my other effects, real and personal, moneys, bonds, notes and obligations of whatever nature and kind, to Maria, the wife of the aforesaid Francis Lockwood, and to Francis Lockwood, in equal proportions as aforesaid, after the decease of my beloved friend Aimée, should she be the survivor; and the survivor or survivors of the said legatees, be which of them it

may, shall inherit the whole."

The inferior Judge was of opinion, that under this will, the plaintiff was without any title to the slave, either as usufructuary or as owner. In this opinion we agree so far as relates to the ownership of the slave claimed by the plaintiff, as derived by inheritance from her daughter, Maria. The will contained a universal legacy to Maria Lockwood and to her husband. Francis Lockwood, should they both survive the plaintiff, or to the survivor of these two legatees, should only one of them survive the plaintiff. Maria Lockwood having died in July, 1841, the testamentary disposition lapsed as to her and her heirs, it being made on a condition depending on an uncertain event, to wit, the survivorship of the plaintiff and of her husband. Civ. Code. art. 1691. The bequest itself, moreover, by its very terms gives the whole property to the survivor of these two legatees. In fact this part of the claim seems to have been abandoned by the appellant's counsel; but he contends that, under a proper construction of the will, she is entitled to the usufruct of the property, real and personal, left by the deceased, and which, after her death, is to go to Francis Lockwood, if he survives her. The fifth clause of this will does not, in terms, give the plaintiff the usufruct she claims, but on an attentive examination of that instrument, and from its whole tenor, it can be satisfactorily inferred that such was the meaning and intention of the testator, notwithstanding the inaccurate and bungling manner in which it is drawn up. clearly gives nothing to Maria, or to Lockwood, before the death of Aimée. Are we to suppose that the testator made no disposition as to what should become of his property, or who should

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enjoy it, from the time of his death to that Aimée's, which might be a period of many years; and that he intended to leave the property without any legal owner or possessor, during that uncertain space of time? This hypothesis, in itself so extremely improbable, is we think excluded by the terms of the will, when attentively considered. The third, fourth and fifth clauses of that instrument, which embraces all the legacies it contains, had evidently a close connection with each other in the mind of the testator, and must be taken and examined together. In the first he gives to the plaintiff, in express words, the enjoyment, during the term of her natural life, of the premises in which he resided. In the second he gives the same property in fee simple to Maria, the daughter of the plaintiff; and in the third clause, after bequeathing his property, real and personal, to Maria, and Francis Lockwood, her husband, in equal portions, he adds, "as aforesaid, after the death of my beloved friend Aimee;" these words evidently refer to the two clauses immediately preceding, by which he had given to the plaintiff, in express terms, the usufruct of the property, which, after her death, was to belong to Maria in fee simple. They show, we think, that his intention was the same in relation to his other property, real and personal, which after her death was to be divided between Maria and Lockwood, or to go to the survivor of these legatees; but which, in the mean time, was to be enjoyed by Aimée, in the same manner as provided for in the third clause of the will. This construction, which gives effect to every word used in the instrument, is more consonant to reason and to the probable intention of the testator. Civ. Code, arts. 1705, 1706.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that this case be remanded to be proceeded in according to law; the appellee to pay the costs of this appeal.

FRANÇOIS V. Bonis and others v. Thomas James and others.

Action for damages for a trespass committed by defendants on lands possessed by plaintiffs as owners, and defence that the lands belong to the United States, and that defendants entered thereon for the purpose of acquiring a pre-emption right thereto: Held, that the title of one possessing as owner cannot be subjected to investigation at the instance of a mere trespasser; and that a party cannot be permitted, under pretext of an intention to purchase from the United States, to assume that land, in the possession of another, is public, and liable to be entered on at pleasure.

APPEAL by Hornsby and Printey, two of the defendants, from a judgment of the District Court of Pointe Coupée, in favor of the plaintiffs. Deblieux, J.

S. L. Johnson and L. Janin, for the plaintiffs. Ratliff, Boyle and Paterson, for the appellants.

GARLAND, J. This is a possessory action, in which the plaintiffs allege, that they are possessors as owners for more than a year, of a tract of land, at a place called the Racourci Bend, on which the defendants have entered and are committing waste by cutting timber, cordwood, &c. Writs of sequestration and injunction were issued, to arrest the commission of further trespasses and waste. In their petition, the plaintiffs, for the purpose of showing the extent of their possession, set forth the titles under which they hold, commencing with that derived from the Spanish Governor, Carondelet, in 1796.

The defendants, after a general denial, and a special denial of an amicable demand to quit the premises, aver that the land on which they are, and on which the alleged trespasses are said to have been committed, is public, and belongs to the United States; that they have taken possession of it, and expect, in due course of time, by complying with the requirements of the pre-emption laws passed by Congress, to secure a right and title to said land; and that, therefore, they have a right to possess it.

The taking possession by the defendants was in the months of December, 1841, and January, 1842, a few months after the passage by Congress of the pre-emption law of 4th September, 1841. See acts of 1st session, 27th Congress, Laws United States, vol. 10, p. 155. This suit was instituted in March, 1842, and the

answers of the defendants filed in the month of May following, at which time they had not made any application at the Land Office of the district to purchase the land; nor does it appear to have been legally surveyed.

By documents given in evidence it appears, that on the 10th January, 1796, Ursin, and Dominique Bouligny, each applied to Gov. Carondelet for a tract of land of forty arpents front, by the ordinary depth, within the limits of the post of Pointe Coupée, at a place called La Laguna del Racourcy, upon which the usual orders were issued, directing the surveyor of the province to put each in possession; and on the tract now occupied by the plaintiffs, a settlement was made shortly after. In the year 1808 the Boulignys presented their claims, in the same notice, to the land officers in New Orleans. Their lands are described as being situated "in the county of Pointe Coupée, containing eighty arpents in front, on the right bank of the Mississippi, by forty arpents in depth." With this notice and the title papers, a plat of survey made by Charles Morgan, a surveyor, was presented, on which the upper boundary of the eighty arpents is represented as being on or near the bank of the river, which it follows down for a considerable distance, until it reaches a hackberry tree, growing on what is represented and called a willow point; thence the line changes its course, and seems to run along or near to the edge of the willow point for upwards of forty arpents, to the lower boundary. With the exception of a very small portion of the lower end of the lagoon, (laguna,) it is all represented as within the front line; and it is evident, that the surveyor did not intend to make the tract front on it. On the outside of the line a trace or road is represented, as is also the Mississippi river, and a large point or batture covered with willows. But along, or near this line, the parol evidence shows, that there was some high ground on which other trees grew, such as gum, cotton-wood, ash, &c. Upon the title papers, plat, and evidence of settlement, the title for forty arpents front was confirmed, so as to include the improvements. See vol. 2, State Papers, Public Lands, p. 332. a subsequent period, a claim for the remaining forty arpents front was presented, and recommended for confirmation. See vol. 3, State Papers, Public Lands, p. 257. It is there stated as

being on the right bank of the river, at the place commonly called Racourci. In the year 1818, Dominique Bouligny sold to one Martin Tournoir five arpents front of the same tract, which the plaintiff claims, with a reservation to himself of the alluvion or batture in front of it. In January, 1830, Bouligny and Jean Mercier, sold to Martin Bourgeat thirty-five arpents front of the same tract. They describe it as being at a place called the Baie du Racourci, upon the right bank of the river Mississippi. They then proceed to describe the front, side and rear lines, giving courses and distances, as the whole will appear by a plat said to be annexed to the sale, but which is not produced. They say nothing about a batture or alluvion, but sell the tract as described. with all its appurtenances. On the 7th February, 1833, the heirs of Bourgeat sell something over twenty-one arpents front of the land to Bonis and wife. They describe the land by lines. courses and distances, and say that it has its face sur la baie, with such depth as may be found, &c., situated at the place commonly called Racourci. To the land so described they give a warranty. They then proceed to say, that they sell without warranty, all the rights they have or may have to the portion of the alluvion or batture in front of said tract of land. About the same time the aforesaid heirs sold the remainder of the tract of land to one John C. Turner. It is described as having eight arpents front, by a certain depth. They also sell "a riparious right to the batture, but without warranty." The plaintiffs. Turnbull and wife, hold under Turner, with a transfer of all his rights. About the time these sales were made to Turner and Bonis and wife, H. T. Williams, a United States surveyor, being engaged in making surveys in that section of country, undertook to locate the Bouligny claims. He seems not to have been very accurately informed as to their titles, nor was he requested by any one interested, so far as the record informs us, to locate the claims, nor were any of the claimants present. He placed the front line of the claim under which the plaintiffs hold, a considerable distance from the river, following very nearly the lines of Morgan, which were run in 1808; and he represented the land between that line and the river, as public. This survey has never been approved, and the surveyor, becoming himself Sur-

veyor General, declined approving his own work, in consequence of representations being made to show its want of accuracy. The present Surveyor General of the United States also declines approving it. Since the institution of this suit, in consequence of representations made by one or more of the defendants, a survey was ordered by the Surveyor General now in office; but as soon as he was more fully informed he arrested the execution of his order, and has never approved the work of his deputy. Upon a sketch or plat made by the deputy surveyor last mentioned, the defendants, Hornsby and Printey, presented themselves at the Land Office, more than one year after the commencement of this suit, and claimed a pre-emption right on proof of settlement, but could not complete the purchase, as there was no approved township map in the office.

The parol testimony is voluminous, and shows what has been the condition of the land for more than forty years. The witnesses who have known the point or batture longest, say that, in front of the lagoon or baie, there was at their earliest recollection a ridge of high land, on which cane and trees of large size grew, which was not overflowed except at the very highest stage of the river; and that on this the road ran. There were other ridges and sloughs across the point, in early times. seem to have been annually covered with water. batture has increased in dimensions, and become higher every There are now large trees in many places, and land susceptible of cultivation, showing that the formation was ancient. What the situation of the batture was at the time the land was granted in 1796 is not shown; but it is difficult to believe that the Spanish Governor intended that there should be a narrow slip of high ground in front of the land he granted, thus preventing the grantees from getting to the river. It is apparent from the plat of Morgan's survey made in 1808, that he did not intend that the lagoon should be the front; and it would also seem, that he ran the line as near to the willow bank as it could well be done. We know it is not the practice of surveyors in measuring a base or front line, to follow the bends of the stream to get the distance or quantity wanted; but to run their lines straight, changing their direction only when necessary to enable them to

reach the point of destination. It is, therefore, not at all surprising that some spots of high land should be found outside of the front line, as run by the surveyor.

The main question in the cause is, was it intended that the claim of Bouligny should front on the river? When we take into consideration the usages and laws under the Spanish government, they raise a strong presumption that such was the in-When we look at the confirmation of the titles by the tention. United States, we see the lands described as on the right bank of These terms are not generally used to describe land lying at a distance from the bank. In 1818, the grantee Bouligny certainly conceived that he had some right to the batture, as he reserved it in his sale to Tournoir. The vendors of the plaintiffs, in 1833, supposed that they had some claim to it also, as they sold all their rights to the plaintiffs, who possessed under this claim of right, until disturbed by the defendants. But say their counsel, Bourgeat did not acquire any right to the batture by his purchase from Bouligny and Mercier, and, therefore, could not transfer it, even admitting that the last were entitled to it. This is perhaps true; yet his heirs sold all their rights to the plaintiffs, whatever they were; and they had possessed as owners more than eight years under these sales, previous to the defendants going on the land. In this action we cannot inquire into the validity of the plaintiffs' titles to the property. The question is simply one of possession. For several years before the defendants went on the premises, the plaintiffs occupied them, under notarial acts of sale. Two or more small houses had been erected, some fences had been put up, and wood had been cut at different places. Open and public acts of ownership were exercised. Shortly after the defendants took possession, they were notified of the claim of the plaintiffs, notwithstanding which they persisted in remaining on the land; and, more than a year after the institution of this suit, endeavored to get a title to it, by the presentation of an unapproved and unauthorized plat of survey to the Register of the Land Office, and by attempting to prove a settlement on land to which, at the time, they knew that others set up a claim.

When persons wish to obtain a right of pre-emption from the Vol. VII. 20

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United States, they must take care to settle on lands belonging to the government, and not on those notoriously possessed by others as owners, under an apparent title. It cannot be permitted to any one, under the pretext of an intention to acquire a title by purchase from the United States, to assume that the land he fancies, though in the possession of another, is public, and therefore, liable to be entered on at pleasure, and the possessor's title subjected to investigation at the instance of a trespasser. 3 Rob. 318. Code of Pract. art. 47.

Judgment affirmed.

THE WESTERN MARINE AND FIRE INSURANCE COMPANY v.
M. P. CASSELLY and another, Owners of the Steamer Ohio
Belle.

JACQUES LAROSE v. THE SAME.

Where in an action for damages against the owners of a steamer for injury result ing from a collision between the steamer and plaintiffs' vessel, the evidence leaves it doubtful whether any fault was attributable to the officers of the steamer, plaintiffs cannot recover.

Appeals from the District Court of the First District, Buchanan, J. These cases were tried without a jury.

Canon, Maybin and Grymes, for the plaintiffs.

R. H. Chinn and Roselius, for the appellants.

Bullard, J. These two actions are instituted against the owners of the steamer Ohio Belle to recover damages resulting from a collision between that boat and the schooner called the Creole, alleged to have occurred by the fault of its officers. One of them is brought by the owner of the schooner, which was sunk and totally lost, and the other by the underwriters, who had paid for one hundred hogsheads of sugar, the cargo of the schooner, insured by them. The two cases were cumulated and tried together, and the defendants are appellants from a judgment in each case against them.

The collision occurred in the night when the steamer was as-

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cending the river Mississippi, and the schooner was descending. In such cases it is extremely difficult to ascertain with proper certainty, the circumstances attending the accident, owing partly to the confusion and alarm with which such casualties are always attended, and partly to the bias on the minds of the crew, and even of the passengers on board, in favor each of their own vessel. The mind of the Judge or jury is thus liable to be bewildered and confused by these cross-lights of evidence, and finds it difficult to figure to itself the exact position of the two vessels immediately preceding, and at the moment of the collision, and to ascertain the means used by one or both to avoid the catastrophe. In the present case, for example, if we believe the officers and crew of the schooner, it was a clear star-light night; while it is equally well proved by the officers and passengers on board the steamer, that it was very dark and had been raining, although the outline of the bank of the river was visible and sufficiently distant for safe navigation. One thing, however, appears certain, to wit, that the schooner struck the steamer head on, nearly at right angles, between the fore hatchway and the boilers, on the starboard side; her bow was stove in, and she sunk very soon, while the steamer received no injury.

Between a vessel propelled by steam and another by wind, under ordinary circumstances, the means of avoiding a collision are greatly in favor of the former, in consequence of the control which human ingenuity has contrived over the more powerful agent itself, by means of which the vessel may be stopped, its course changed in any direction, and even backed. In one respect, however, the steamer has no advantage over a sailing vessel in the night. A steamer may be seen, and, when on the high pressure principle, may be heard at a much greater distance than a sailing vessel. The fires of the furnace, the lights from the cabin windows, the volume of black smoke, and often pencils of sparks issuing from the chimneys, and the puffs of the escape pipe, give warning of its approach. At the same time the noise of the engine and the wheels, and the escape of steam render it more difficult to hear the hailing of another boat, or cries from the banks of the river. Hence it is not difficult to account for the officers on board the Ohio Belle not having heard the repeated Western Marine and Fire Ins. Co. v. Casselly and another. Large v. The Same.

hailing from on board the schooner. It is also well known, that with a light near the eye, distant objects cannot be seen as well as without such light; and hence we find no difficulty in giving credence to the uncontradicted statement of the officers and passengers on board the steamer, that the schooner was not seen until she had approached very near the steamer, certainly not further off than two hundred yards. Some of the witnesses say much nearer, and approaching in a direction to cross the track of the steamer, nearly at right angles. In this the concurrent positive testimony of all the witnesses who were on board the steamer, must outweigh the negative statements, or opinions of others, either on shore or on board the schooner.

The plaintiffs cannot complain if we take the statement of the captain of the schooner as true, in relation to the circumstances which preceded the collision. It is admitted, that the schooner was descending the river after having taken in her cargo of sugar, and was under full sail. The captain says in his testimony. "when they first saw the steamer, she was about a mile and a half from the schooner, and was hugging the shore, as they usually do, and the schooner was in the middle of the river; the wind was north-west, being in an excellent quarter to descend the river." According to this account of the occurrence, about fifteen minutes elapsed from the time they first saw the steamer. to the moment when the concussion took place. With the wind and current both favorable, it is not easy to understand why the captain of the schooner did not change his course so as to avoid the steamer. It is not satisfactorily shown that any thing prevented his doing so. On the other hand, there appears no good reason to doubt, that there was a proper look-out on board the steamer, and that the schooner was not seen until it was so near as to leave little time for proper measures to avoid her.

It has been urged as a proof of culpable recklessness on the part of the officers of the steamer, that they did not stop to offer assistance to the sufferers on board of the schooner. Such an argument would have considerable force, if it were shown that the extent of the injury was known at the moment. But the thing was so sudden, and created such alarm for the safety of the

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steamer itself, that in the confusion and darkness, no one appears to have been aware that any serious injury had been inflicted.

Upon the whole, an attentive examination of the whole evidence leaves it doubtful, in our opinion, whether any fault was attributable to the defendants; and we think the plaintiffs have failed to make out their case.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed; and it is further adjudged, that ours be for the defendants, with costs in both courts.*

Joseph Orillion and another v. Eliphalet Slack.

APPEAL from the District Court of Iberville, Deblieux, J. Labauve and A. Hennen, for the plaintiffs.

L. Janin and B. Winchester, for the appellant.

Bullard, J. This case was remanded last year, (4 Robinson, 120,) for the purpose of ascertaining and establishing the division line between the lands of the parties according to the opinion of this court, or in conformity to certain principles therein recognized as applicable to the case.

That line has been established by the judgment last rendered, to be at one hundred and sixteen links above the lower boundary of the patented lot No. 26, and the representative of Slack has again appealed. The appellee also complains of the judgment, and prays that it may be reversed in his favor, so as to maintain

Re-hearing refused.

^{**}Canon, Maybin and Grymes, for a re-hearing, contended that the judgments of the lower court, being on mere questions of fact, should not be disturbed unless manifestly erroneous. Bordelon v. Kirkpatrick, 3 Rob. 159. That admitting that all the fault is not proved to have been on the part of the officers of the steamer, but that both parties were to blame, the rule in admiralty should prevail, and the loss be divided. Jacobson's Sea Laws, 328. 1 Emerigon, ch. 12, § 14, p. 413 2 Valin, book 3, tit. 7, art. 10. 3 Kent, 230, 231. 1 Bell's Comm. 489, 490. 2 Dodson's Adm. Reports, 55. Brickell v. Frisby, 2 Rob. 204. The collision occurred in this State, and should be governed by the maritime law. 1 Howard's Supreme Court Reports.

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him in possession, and confirm his title to all the land covered by the patent for lot No. 26.

We are clearly of opinion that Slack, claiming under Reboul or Franchebois, can in no event recover any part of the land included in the patents for lots No. 26, 27, 28. He is bound by the authority of the thing adjudged in the case of Slack v. Oril-We then said, "the patentees have, in our lion, 13 La. 56. opinion, the best title to the three lots in question," and affirmed the judgment of the District Court, which was against the plaintiff (Slack) in regard to the claim set up in his petition against the defendant. This is the opinion expressed when this case was last before us; but inasmuch as Orillion was not precluded by the same judgment, from setting up title to other lands outside of his patent, the first judgment being against him only as in case of a nonsuit, it did not follow, in our opinion, that the patent line was necessarily the real boundary; for, although Slack could never go above it without disregarding the authority of the thing adjudged, Orillion, under his sale from Erwin, may have acquired land below the patent line. The confusion has arisen from the circumstance that, until the trial of the present cause, it was not disclosed that both parties claimed under Erwin, by successive sales. It is possible that injustice may have been done; but it is too late to remedy it. ment first rendered in the District Court, and affirmed in this, must have its full effect between the parties, although according to the evidence now before us, the line between them would perhaps run into the patent for No. 26.

The District Court, by establishing as the boundary line between the parties, the line a few links above the lower boundary of the patent, in effect decreed to Slack a part of the land covered by the patent; and, in doing so, respected, it is true, the possession of the parties, but disregarded the previous decision which declared that Orillion has the best title to the whole land covered by the patent. In this respect there is, in our opinion, error to the prejudice of the appellee, and the patent line itself ought to be established as the boundary.

It is, therefore, ordered and decreed, that the judgment of the District Court so far as it establishes the boundary line be revers-

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ed, and that in lieu thereof, the line beginning at the bayou Grosse Tête, at the Point B, as shown on the plat of survey No. 2 in the record, and running north, 52 degrees east, be and the same is hereby decreed to be the boundary line between the parties; that in other respects, except as to costs, the judgment be affirmed; and that the defendant, Slack, pay the costs of both courts.

JOHN J. CAIN v. LOUIS BOULIGNY.

No law creates any legal mortgage on the estate of a marshal of the City Court of Lafayette for the faithful discharge of the duties of his office, nor can any such mortgage be created by recording his official bond in the office of the Recorder of Mortgages. The tenth sect. of the act of 15 March, 1830, establishing a mortgage on the estates of sheriffs, does not apply to marshals.

No legal mortgage exists but in the cases provided for by the Civil Code, or by subsequent statutes. C. C. 3280.

APPEAL by one Laizer from a judgment of the District Court of the First District, Buchanan, J.

McKinney, for the petitioner.

C. Janin, for the defendant.

No counsel appeared for the appellant.

SIMON, J. This is an appeal from a judgment ordering a mandamus to be issued, commanding the Recorder of Mortgages of the parish of Jefferson to erase from the records of his office the bond of the appellee, as Marshal of the City Court of Lafayette, which the Recorder certifies as creating a general mortgage.

The law by virtue of which the City Court of Lafayette was established, was passed on the 2d of April, 1835. Bullard & Curry's Digest, 229. It is true that by the 6th section of this law, the Marshal to be appointed is to give a bond in the manner prescribed for sheriffs, conditioned for the faithful and honest discharge of the duties of his office, which bond is to be filed with the clerk of the court; and that by the 10th section, the bond so given by the Marshal may be cancelled in the manner provided by law for cancelling sheriffs' bonds.

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But, the Civil Code, art. 3280, declares, that there shall be no legal mortgages but those which are recognized by that Code; and among the laws passed subsequently, there is but one which establishes a legal mortgage on the estates of sheriffs, for the purpose of securing the due performance of their duties, and the due payment of all sums for which they may be liable as collectors of taxes. B. & C.'s Digest, 729, § 126. This law is not applicable to marshals, and we must, therefore, conclude, that the recording of the appellee's bond cannot have the effect of a general mortgage on his property; and that the inscription was properly ordered to be erased. 8 Mart. N. S. 244, 316. 2 La. 48.

Judgment affirmed.*

LEWIS DANIELS v. WILLIAM J. ANDREWS.

Where a case in which the defendant prayed for a trial by jury, has been transferred to the docket of cases to be tried by the court, in consequence of the defendant's failure to advance the compensation allowed to the jurors, as required by
the statute of 10 February, 1841, s. 17, and has been taken up as a court case,
it will be too late, at the moment of trial, to tender the compensation, and to
move for a re-transfer of the case to the jury docket.

An affidavit for a continuance on the ground of the absence of a witness, which does not show the materiality of his testimony, nor due diligence to procure his attendance, is insufficient.

Action for damages against defendant for falsely representing to plaintiff, that he had concluded a contract for him for the delivery of a quantity of shells, at a certain price per barrel. It was proved that no such contract had been made; but defendant answered, that he was willing to receive the shells at the price mentioned, and to pay the costs. Per Curiam: The court cannot compel a party to accept a new contract in lieu of one already violated, with a new party and under different circumstances, nor to waive his right to recover damages.

APPEAL from the District Court of the First District, Buchanan, J.

R. H. Chinn, for the plaintiff.



^{*}A mistake into which the court fell, in preparing the opinion in this case, as to the laws creating mortgages on the estates of sheriffs, having been subsequently corrected by Simon, J., the opinion is published as corrected.—Reformer.

Daniels v. Andrews.

Lockett and Micou, for the appellant.

BULLARD, J. The plaintiff alleges, that he is a planter, of the State of Mississippi, but has occasionally contributed to supply New Orleans with wood, shells, and other commodities; and that the defendant, Andrews, was his commission merchant, and the consignee of his wood and freight. That the defendant represented to him, by letter, that he had made a contract for him for the delivery of eight or ten thousand barrels of shells, at thirty-three cents per barrel; and that, in order to comply with said contract, he reduced his cotton crop, and began to procure and transport the shells to the city. After a small part had been delivered, the plaintiff was informed that, in point of fact, no such contract had been made, but that the defendant had made false representations to him on the subject, for the sake of getting the commissions; and the present action was brought to recover damages for such misrepresentations, whereby the plaintiff failed to make large profits.

The case was clearly made out by evidence furnished by the defendant himself in his various letters, in which he at first stated in positive terms, that he had entered into a contract, and afterwards admitted that no such contract had been made. The court below assessed the damages at four hundred and forty-eight dollars; and the defendant appealed.

The case is before us on two bills of exceptions, from the first of which it appears, that when the case was called for trial, the defendant moved for a jury, as was prayed for in his original answer, and offered to pay the fees, as required by the act of 1841. The motion was overruled, on the ground that it came too late. The trial took place in January, 1842, and the case was pending when the act of 1841 was promulgated. That act requires, that cases then pending should be struck from the jury docket, unless the compensation allowed to jurors be advanced by the party demanding a trial by jury. The case appears to have been regularly taken up as a court case, and we are to presume had been transferred to that docket, on the defendant's neglecting to advance the jury fee. B. & C.'s Dig. 520. It was, therefore, too late at the moment of trial, to re-transfer the case to the jury docket.

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The second bill of exceptions shows that the court refused to postpone the trial on account of the absence of a witness, whose testimony, it had been agreed, should be taken by consent. defendant's affidavit shows, that the witness attended according to appointment with the plaintiff's counsel, for the purpose of cross-examination, but that the counsel did not attend. fact was admitted; but the court overruled the motion on the ground that proper diligence had not been shown to produce the witness, or to establish that he was absent. The court did not err. The affidavit is clearly insufficient for the purpose for which it was offered. Nothing shows the materiality of the testimony of the absent witness, and no diligence was used to procure his attendance, or to show his absence. The offer of the defendant in his answer, and repeated on the trial of the cause, to receive the shells called for by the alleged contract, at thirty-three cents per barrel, and to pay the costs, cannot avail him. The court cannot compel a party to accept a new contract in lieu of one which has been already violated, and with a new party, nor to waive his right to recover damages in a case so clearly made out, upon an offer to adopt the contract falsely represented by the defendant to have existed, and that under totally different circumstances.

Judgment affirmed.

CHARLES A. JACOBS v. WILHELMUS BOGART.

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All actions pending, and all claims against one who has made a forced surrender under the statute of 25 March, 1808, for the relief of insolvent debtors in actual custody, must be removed to, and cumulated in the tribunal before which the insolvent proceedings are pending.

No security is required by the statute of 25 March, 1808, relative to insolvent debtors, from syndics appointed under the provisions of that act. The first section of the act of 13 March, 1837, is the only law requiring syndics to give security, and it relates exclusively to insolvent proceedings in cases of the voluntary surrender of property under the statute of 20 February, 1817. The statute of 1817 does not apply to forced surrenders. The two modes of surrender are distinct, and governed by different laws.

Where a creditor who has been placed on the schedule of an insolvent, and made

a party to the proceedings for a forced surrender under the act of 1808, does not prove his debt, nor make any opposition in the lower court to the discharge of the insolvent from his debts, it will be too late to oppose his discharge on an appeal.

A seizure under a fi. fa. of property of a debtor made after a petition has been presented for a forced surrender under the act of 1808, is illegal. Act of 25 March, 1808, s. 20.

No appeal will lie from a judgment setting aside a seizure of the property of an insolvent, made under a fi. fa., issued after the commencement of the insolvent proceedings. Per Curiam: The judgment works no irreparable injury. It does not deprive the party of any advantage he may have gained by the seizure, which may be claimed on the filing of the tableau of distribution. Its only effect is to place the property in the hands of the syndic to be administered.

APPEAL from the Commercial Court of New Orleans, Maurian, J., presiding.

G. B. and L. C. Duncan, for the appellant.

Peyton, I. W. Suith and Grymes, for the syndic.

MORPHY, J. The facts which led to this appeal are as follows: In December, 1837, Coleman Williams obtained in the District Court of the First Judicial District, a judgment against Wilhelmus Bogart, for \$16,716 32. In April, 1840, Charles A. Jacobs, also a judgment creditor of Bogart, instituted proceedings against him in the Commercial Court, to compel a forced surrender of all his property, under the act of 1808, for the relief of insolvent debtors in actual custody. The creditors met in open court, voted unanimously for W. Bogart to be the syndic of his own estate, giving him the most extensive powers, and dispensing him from the necessity of furnishing security; whereupon, on the 27th of July, 1840, a judgment was entered below appointing the insolvent as syndic, and forever discharging him from imprisonment, from all suits and actions pending against him, and from all debts by him theretofore contracted. After these proceedings had commenced, to wit, on the 5th of May, 1840, Coleman Williams, who was a party to them, and whose name figured on the schedule for the full amount of his debt. caused an alias fi. fa. to be issued on his judgment from the District Court, which the Sheriff returned as "stayed by the failure of the defendant." On a suggestion of the failure of Bogart, the District Court ordered the suit of Williams against him

to be transferred to the Commercial Court, there to be cumulated with the insolvent proceedings. As, notwithstanding the return of the Sheriff on the alias fi. fa., there had been certain money and notes seized under it, by process of garnishment, in the City Bank of New Orleans, a rule for the release of this seizure was taken by the syndic on Williams, and, on the 29th of August, 1840, a judgment was rendered on it, setting aside the seizure, and ordering the Bank to pay over to the syndic the said money and notes. On the 4th of December following, Williams took a rule on the syndic to show cause why this suit against Bogart should not be transferred to the District Court, on the ground that it had been removed without notice to him, and that there were questions therein pending between parties, other than the said Bogart, of whom the court below could take no jurisdiction without their consent. This rule was discharged; whereupon Williams appealed; but in his petition of appeal, and in the order of the Judge, it is distinctly stated, that the appeal is taken from the judgment of the 27th of July, 1810, appointing Bogart as syndic without requiring of him security for his faithful administration, and discharging him from his debts, and, among others, from that due to the appellant, and also from the judgment of the 29th of August, 1840, releasing from the appellant's seizure the money and effects held by the City Bank of New The only point made by the appellant in this court, and upon which he claims our interference is, that there is error in the judgment discharging the rule he had taken to have his case sent back to the District Court, from which he says it was improperly removed to the court below. This point we should not perhaps notice at all, as there is no appeal from the judgment before us. But were we even to consider the appeal taken as extending to it, we cannot see how the court erred. It is well settled, that all suits and claims against an insolvent must be removed to, and cumulated in the tribunal before which the insolvent proceedings are pending. The order, or judgment of the District Court for the transfer of the cause, was made on the 12th of June, 1840, one month before the meeting of the creditors took place, and was not executed by the actual removal of the record until the 25th of August following. If this order was erroneous,

it ought to be appealed from, and the cause retained in the District Court until the decision of this court could be had; but it cannot be seriously expected of us, to revise an executed judgment of the District Court, on an appeal from the Commercial Court.

We shall now proceed to examine the two judgments complained of in the petition of appeal.

The first is that which appoints the insolvent syndic of his creditors, without requiring security, and which discharges him from his debts.

The proceedings in this case clearly originated and were carried on under the 7th section of the act of 1808, for the relief of insolvent debtors in actual custody. B. & C.'s Dig. 481. act does not provide that the syndic, or commissioner to be appointed under it, shall give any security. The only law requiring syndics to give such security is the first section of the act of the 13th of March, 1837, which expressly professes to amend the 14th section of the act of 1817, relative to the voluntary surrender of property, and the provisions of which are confined to individuals who shall not yet have been imprisoned for debt. law of 1837 does not purport to amend any other act than that of 1817, nor to regulate insolvent proceedings in any other cases than those embraced by that act. The statute of 1817 provides for voluntary, not forced surrenders. The two modes of surrender are distinct, and governed by different laws. This court, in the case of The Planters' Bank et al. v. Lanusse et al., held, that the act of 1817, directing the proceedings to be pursued in cases of voluntary surrender, does not govern those that are forced. 10 Mart. 690. It would seem then to follow, that the provisions of the act of 1837 should not be extended to proceedings had under the law of 1808, and that no security can be required of a syndic, or assignee, appointed by creditors at a meeting in open court, under the provisions of that act. But even were the law of 1837 to be considered as applicable to cases of forced surrender, the first section provides, that the syndic shall not be required to give security, if two-thirds of the creditors in number and amount dispense with it. B. & C.'s Dig. 498. In this case the creditors unanimously dispensed with this security; and

among those who so voted, were the only two mortgage or privileged creditors appearing on the schedule, to wit, Bogart & Hawthorn and Joseph Fowler. It is true, that a proviso at the end of this section, requires the syndic to give security for the amount of the mortgage and privileged claims; but it is not shown that there were any such claims besides those of the two creditors who voted for a dispensation of the security. This proviso was clearly intended to protect the mortgage and privileged creditors against the overwhelming votes of the ordinary creditors. The appellant has not shown himself to be a mortgage creditor. He was a party to the concurso; did not appear to prove his debt at the meeting of the creditors in open court; made no opposition to the proceedings out of which an issue could be formed, but stood by, suffering the proceedings in insolvency to be closed, and then appeals from the several orders rendered in the course of such proceedings, when, perhaps, under the third section of the act of 1808, he should not be considered as a creditor at all. B. & C.'s Dig. 480. The judgment below, moreover, does not decree that the syndic be dispensed from giving security, nor does it mention anything on the subject. under the law, he was bound to give security, he could at any time have been ordered to do so. But the appellant has asked for no such relief below; and we will not presume that had he made a lawful demand of the inferior court, it would have been denied to him. As to the discharge granted to the insolvent, it was the natural consequence of the proceedings had under the The judgment is to the effect, and in the very words act of 1808. of the third section of that law. The appellant was a party to those proceedings, as he himself alleges in his petition of appeal. Not having appeared to prove his debt, nor made opposition to the insolvent's discharge, it is now too late to oppose it; and he cannot be listened to.

The other order or decree which Williams has appealed from, is that making absolute the rule taken by the syndic, to release from his seizure the money and notes in the City Bank. Of the correctness of this judgment we can entertain no doubt. The alias fi. fa. under which this seizure was made, was issued after the commencement of the insolvent proceedings in the Commer-

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cial Court, and was unauthorized by law. B. & C.'s Dig. 484. This judgment, moreover, is not such a final one as an appeal will lie from. The setting aside the seizure, did not deprive the plaintiff in that suit of any of the advantages he may have gained by it. He can claim them upon the filing of a tableau of distribution. In the mean time he sustains no irreparable injury. The only effect of the order is, to place the money and effects in the hands of the syndic, to be administered upon; and in this we see no error.

Judgment affirmed.

Succession of Francisco de Paula de Lizardi—Juan Ygnacio de Egana and others, Appellants.

An attorney in fact appointed by the natural tutrix of minor heirs residing abroad, cannot represent the heirs in the settlement of the succession of their father, opened in this State, where the property left by the deceased was held in community, and the natural tutrix as surviving spouse, has rights which must be exercised contradictorily with the minor heirs. In such a case, an attorney must be appointed to represent the absent heirs. C. C. 1654. Per Curiam: If the natural tutrix were present, having rights to exercise contradictorily with the minor heirs, she could not represent them; an under-tutor alone could act for them. C. C. 301.

APPEAL from the Court of Probates of New Orleans, Bermudez, J.

L. Janin, for the appellants.

Blache, attorney for the absent heirs, contra.

Simon, J. Francisco Paula de Lizardi died at Paris, on the 10th of March, 1842. He left a will, in which he instituted his wife and his children his universal heirs, in the words following, to wit; "I direct that the capital which I was possessed of at the time of my marriage, in 1828, with Donna Helena Cubas, as it appears by the balance made up to the end of said year, of the house which bore the designation of Lizardi Brothers, and that which I have gained since then, be divided into two equal parts; the one to belong to my wife, and the other part to be distributed in perfectly equal shares among my six children, &c." The pro-

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bate of this will was regularly granted by the Prerogative Court of the Archbishop of Canterbury, in London.

It appears, further, that the testamentary executors appointed by the deceased in his testament, and the widow, as natural tutrix of her children and co-heirs, sent their powers of attorney to Messrs. Juan Ygnacio de Egaña, Felix Grima, and Alexander Gordon, all residing in New Orleans, for the purpose of taking possession of the estate in Louisiana, composed of real and personal property situated at New Orleans and elsewhere, and of administering the same and disposing thereof, according to the terms of the said powers of attorney; whereupon the said attorneys in fact, in the names of their constituents, made application to the court, a qua, praying that one of them might be appointed dative testamentary executor; that the applications made by other persons be rejected; or that they be allowed to take possession of the estate, and accept it for their constituents under the benefit of an inventory; and that one or two of them be appointed administrator, &c.

Divers proceedings were had before the Probate Court in relation to the said testamentary succession, the dative testamentary executorship of which was claimed by several persons; when, after having heard the evidence of all the applicants, in support of their respective pretensions, the court, a qua, decided that Felix Grima, Esq., should be appointed dative testamentary executor of the last will of the deceased, and rejected the demands of the other applicants.

The dative testamentary executor subsequently petitioned the Probate Court, to be authorized to cause inventories of all the property belonging to the said succession, situated in the parish of Orleans, and in other parishes of the State, to be made according to law; whereupon it was ordered, that said inventories should be taken in the presence of all the parties interested, as well as in the presence of Martin Blache, Esq., appointed by said order to represent the absent heirs of the deceased. From this judgment appointing counsel to represent the absent heirs, and from the judgment appointing a dative testamentary executor, the attorneys in fact have appealed.

The appellants appear to have abandoned their appeal, from the

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judgment appointing a dative testamentary executor; and the only question submitted by the parties for our consideration and solution is, whether the court, a qua, acted correctly in appointing counsel to represent the absent heirs of the deceased, whilst it has been shown that said heirs, who are all minors, are represented in the State by the appellants, as the agents or attorneys in fact of their mother and natural tutrix?

From the very terms of the testamentary disposition it is shown, that the testator had acquired property since his marriage with the minors' mother. Such property, if situated in Louisiana, belongs to the community of acquests and gains recognized by our laws, though the parties, (but this is not to be decided in this case.) or either of them, may have resided elsewhere; and, at the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possessed, are presumed common effects or gains, until the contrary be shown. Civ. Code, art. 2374. 5 Mart. N. S. 580. 7 Ibid. 48. 1 La. 206. 2 Ibid. 190. It is clear, therefore, that all the property left in this State by the deceased, must be at least presumed to belong to the community formerly existing between him and the minors' mother and tutrix. to be governed by our laws; and that all such property, if really belonging to the community, must be divided equally between the widow in her own right, and the heirs of the deceased, in right of their father, or disposed of according to his will. Civ. Code, art. 2375.

If the widow were in Louisiana, acting for herself and as tutrix of her children, it is obvious, that having rights to exercise contradictorily with the minors, she could not represent them in any of the acts relative to the community, or to the estate by them inherited. Those acts under art. 301 of our Code, should be performed by the under-tutor, who is authorized to act whenever the interest of the minor is in opposition to that of the tutor; and upon whom alone would devolve the duty of representing the minors at the inventory. See Boileux, vol. 1, tit. 10, chap. 2, § 5. Here it does not appear that the minors have ever been provided with an under-tutor. If they have been so provided, he has not sent any power of attorney; and it is evident, that although the appellants are fully empowered to represent the testa-

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tor's widow, not only in her own right as testamentary heir, but also as natural tutrix of her children and co-heirs, they have no right to represent the latter, and to act for them in the transactions or proceedings in which their interest may be adverse to, or in conflict with those of their tutrix.

Now, under art. 1654 of our Code, when some of the testator's heirs are absent, and not represented in the State, it is made the duty of the Judge to appoint for them a counsel, whose duty it shall be to assist for them at the inventory of the effects left by the testator, to take care of their interests, &c. Under the circumstances of the case we are of opinion, that it was proper, and even necessary, to appoint a counsel for the absent heirs of the testator; and that the Judge, a quo, did not err in making such appointment.

Judgment affirmed.

NATHANIEL MONTROSS and another v. Doak and another.

The naming of a city at large is not such an indication of a place of payment of a note, as will make it necessary to make a demand anywhere to entitle the holder to recover. Per Curiam: The words place of payment mean a house, bank, counting-room, store, or place of business, where the holder can present the note, and the maker provide or deposit funds to meet it, and where a legal offer to pay can be made.

Appeal from the Commercial Court of New Orleans, Watts, J. Emerson, for the plaintiffs.

Claiborne, for the appellants.

MORPHY, J. The defendants, who reside out of the State, are sued under our attachment laws, as the makers of three promissory notes, dated and made payable at New Orleans. The defence set up is, that no demand was made at the place of payment mentioned in the notes, and that under the settled jurisprudence of this court, such a demand is a condition precedent to the right of recovery. The various decisions in our Reports, to which the counsel for the appellants has referred, apply to cases where a particular and certain place of payment is speci-

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fied in the body of the note. The words place of payment, must receive a reasonable construction. They mean a house, bank, counting room, store, or place of business, where the holder can present the note, where the maker can deposit or provide funds to meet it, and where a legal offer to pay can be made. naming of a city at large, is not such an indication of a place of payment, as can make it incumbent on the holder to make a demand anywhere before he can entitle himself to recover, from the impossibility of knowing at what particular place or spot, within the limits of the city, such a demand should be made. Lex neminem cogit ad vana seu impossibilia. Were it shown that the makers had a domicil, or place of business in New Orleans, it might perhaps be contended that, under the terms used in the note, a demand should have been made at such domicil or place of business; but the defendants are non-residents, and have no place of business in the city. In relation to the liability of the drawer and endorsers of a bill drawn upon a person resident in A, but made payable in B, a large city, without specifying any particular place in B, it has been held to be sufficient for the holder either to present the bill to the drawer for payment at his place of residence, or to have the bill at the place where it is payable on the day of payment, and there to have it protested, without making any inquiry for the drawer. Bailey on Bills, 210. 3 Johnson, 208. 3 Kent, 96. As the notes sued on, mention no particular or certain place of payment, no demand anywhere was, in our opinion, necessary to make the defendants liable.

Judgment affirmed.

Knight v. Lanfear and another.

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JOHN KNIGHT v. AMBROSE LANFEAR and another.

Action to recever the amount paid to defendants for a treasury note, endorsed by them to plaintiff "without recourse." It was proved that plaintiff paid a premium for the note, and that, after the sale, it was discovered that the note had been redeemed at the Custom House and cancelled, but that it had been afterwards purloined, the word "cancelled" which had been written on it, extracted, and the note put into circulation. Held, that the sale must be rescinded on account of the error of the purchaser as to the substance of the thing.

APPEAL from the Commercial Court of New Orleans, Watts, J. Wharton, for the plaintiff.

Benjamin, for the appellants. If the plaintiff, as holder of the note, has a claim against the United States, the defendants are not bound. They endorsed it without recourse, warranting only that it constituted a good and genuine claim against the government—not that it would be paid. They warranted the existence of the debt, (Civ. Code, art. 2616,) not the solvency of the debtors. Ibid. art. 2617. The Judge below has decided, that defendants warranted payment, without suit or contest.

Martin, J. The plaintiff states, that he purchased from the defendants a treasury note, of the sum of \$1000, with interest, for which he paid the amount due on the face of the note, with a premium of one per cent; that the paper which was delivered to him, purporting to be a treasury note, was one which had been redeemed by the United States, and by them received in payment of duties, whereby it had become absolutely valueless. The petition concluded with a prayer for judgment for the money paid to the defendants, with interest and costs.

The answer admits the sale of the treasury note, and denies all the other allegations.

There was judgment for the plaintiff, and the defendants have appealed. The evidence shows, that after the note was received at the Custom House in payment of duties, the word "cancelled" was written on two parts of it, across its face; that it was afterward purloined by an unknown person, and the word "cancelled" extracted by chemical process, and the note put into circulation. The defendants, into whose hands it came, on selling it

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to the plaintiff, endorsed on it the words "without recourse," written over their signatures.

The counsel for the defendants and appellants, has not denied any part of the evidence thus introduced by the plaintiff and appellee, but contends, that the First Judge erred in concluding that the note was valueless. He has shown, that the officers of the United States, in the Treasury Department, and in the Custom House at New Orleans, were guilty of gross neglect, after the discovery of the note having been purloined, in refraining to give notice of it to the public; that they endeavored to conceal the fact for some time, with the view thereby to discover the offender; and that several months after the note was purloined, a semi-annual payment of interest on it was made, and the note recognized as a genuine and valid one, by being stamped as one on which the interest had been paid, and suffered to return into circulation.

We have considered the defence in the most favorable point of view in which it can be placed for the defendants. We have assumed for the sake of argument, that the conduct of the officers of the Treasury Department, of the Custom House, and of the bank at which the interest was paid, has been such as to entitle the fair holder of the note to demand its amount from the United States.

It is clear, that the sale must be rescinded on account of the error of the plaintiff, (and we believe of the defendants also,) as to the substance of the object of the sale. Whatever may be its value, if it be not in substance what the purchaser believed he was receiving, his error must invalidate the sale, because it prevented his consent. Non videtur, qui errat, consentire. Pothier gives us, as an example of an error in the substance of the thing, that of a purchaser of a pair of silver candlesticks, who receives a pair of inferior metal, which, indeed, are not valueless, for they may be used for all those purposes for which silver candlesticks can be employed. His error does not result from his having purchased something valueless, but something different from that which he wished to purchase. It may be true, that the note under consideration, on a representation of all the facts of the case to the Congress of the United States, or probably to some

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officer of the Treasury Department, will be ordered to be paid; but this would burthen the holder with delay, trouble and expense. It may be said, that the note is evidence of a claim on the United States; but if it be, it is that of an unliquidated claim. If the character of the note, and all the circumstances attending its redemption, the purloining of it, and the conduct of the officers of the United States before and after the purloining, had been disclosed to the plaintiff when he purchased the note, it is clear he would not have given a premium of one per cent on its amount, for the chance of a successful application at Washington. for the reimbursement of what he advanced. He wished to purchase, and he believed he was purchasing an unadulterated treasury note, receivable in payment of duties at the Custom House, and saleable at the market price—one which he could not be compelled to take back after he had sold it. He was in an error when he received as such the note which is the object of the present suit. His error prevented his consent; and the absence of his consent deprived the sale of all its effects and consequen-

Before the sale, the defendants had a claim, as their counsel has urged, and we assume, on the United States for the amount of the note. This claim was a fair object of sale, if its nature had been disclosed; but that was concealed, and was probably unknown to them, and what was offered for sale was something quite different from this claim, resulting from events posterior to the receipt of the note at the Custom House, in the payment of duties. Our learned brother in the Commercial Court did not err.

Judgment affirmed.

Andrew Erwin v. John Greene and others.

Plaintiff sold defendants a tract of land, for the price of which notes were taken bearing interest, at a certain rate, from date until paid. The land was subject to a mortgage in favor of a third person, and it was stipulated in the act of sale, that the notes should remain with a depositary until the vendor should cause the mortgage to be released, and that the notes should not be payable until such release. It was admitted that the land was capable of producing revenue by being rented. There was no attempt by the purchasers to relieve themselves from interest by depositing the price. Held, that the purchasers knowing that the notes were not to be paid until the release of the mortgage, and having consented that interest should run from the date of the contract until payment, the interest must be paid as part of the consideration of the sale.

Where real estate, capable of producing revenue, is sold for a price payable at a fixed period, and the note of the purchaser is taken for the price, without any stipulation as to interest, but subject to the condition that the note shall remain on deposit, and the payment not be demandable until the vendor shall release a mortgage existing on the property, and the purchaser has possession and enjoyment of the thing sold, legal interest will be due on the price of the property from the time when the principal was payable. C. C. 1933, 2531. Though entitled to suspend the payment of the price until the mortgage be released, the purchaser could only avoid the payment of interest by depositing the price. C. C. 2537.

Appeal from the District Court of the First District, Maurian, J. presiding.

Benjamin, for the plaintiff.

Lockett and Micou, for the appellants.

Simon, J. The defendant, Sewall, condemned in solido, with his co-defendants to pay the amount of sundry promissory notes, with legal interest on one of the notes from the time when due until paid, and interest at six per cent per annum, on the other notes from their dates until paid, is appellant from the judgment allowing that interest, and contends that the allowance of interest is erroneous, as by agreement in writing, made between the vendor and vendee of the property for the price of which the notes were given, it was stipulated that the notes should remain deposited in the City Bank until the vendor should produce a certificate, showing the mortgage recited in the several acts of sale was cancelled and released, and that they should not before that period be due or demandable. He prays that the judgment ap-

pealed from be reformed in this particular, by rejecting all the interest claimed until the date of the release of the mortgage.

Five of the notes sued on stipulate that they shall bear interest from date until paid, at the rate of six per cent per annum; and the other, made payable nine months after date, bears no interest. All the notes are identified with the act of sale, and paraphed ne varietur by the notary.

The facts of the case, as agreed on by the parties to the suit, are these: James Erwin caused to be sold at public auction, on the 9th of March, 1837, a large tract of land divided into lots, at which sale Peters & Millard, John Greene (the principal defendant and drawer of the notes sued on,) and Henry Lockett, became purchasers, the whole amount of the sale being several hundred thousand dollars. The entire property was then subject to a mortgage in favor of John McDonogh, as set forth in the sale to Greene, Peters & Millard, and Lockett, which mortgage was security for the payment of notes having many years to run. By the consent of J. Erwin, the notes of Peters & Millard, Lockett, and Greene, as well as other notes of other veudees, amounting altogether to \$100,000 and upwards, were deposited with the notary, as stated in the acts of sale; and the remaining notes were delivered to the vendor. The notes of Peters & Millard, John Greene and Henry Lockett, thus agreed to be deposited, were, by consent of parties, sealed up with the written agreement in an envelope, and handed over to R. J. Palfrey, cashier, and they remained so deposited under seal until the package was re-delivered to the notary on his producing a clear mortgage certificate. In the month of May, 1843, the debt to McDonogh, which had been decreased by the payment of notes as they fell due, was extinguished by payment made to him, in advance, of the sum of \$22,000, the remainder of his debt. Whereupon the mortgage in his favor was released and cancelled in due form: a certificate showing the property to be free from encumbrance was produced to the notary, who exhibited it to the cashier, and to the parties; and the notes were accordingly delivered up by the cashier to the notary, who delivered them to the vendor.

It is also admitted that the town lots sold as aforesaid by James Erwin, were vacant lots, but were in a part of the city where

vacant lots were susceptible of producing revenue by being rented.

The question which this case presents does not seem to be an open one, since the decision of the case of Ball v. Le'Breton, 19 La. 147. Indeed, as the case stands, it does not only bear a very great analogy to the one last quoted, but appears even stronger, from the fact that the notes sued on were to bear interest from date until paid. Such interest, not arising ex mora, may perhaps be considered as a part of the price of the property sold, since the stipulation in the act of sale and in the notes, of its beginning to run on the very day that the contract was executed, and at the very moment that the parties were providing for the notes being deposited for a certain length of time, in consequence of the existence of a mortgage on the property sold, shows that the vendee, notwithstanding his knowledge of the fact that the notes were to be deposited, and were not to be paid until the release of said mortgage should be obtained, consented that the interest therein stipulated should run from the day of the contract until payment. How can the vendee object to paying interest which was a part of his original contract, independent of the circumstance, then known to him and provided for in the act, that the notes were to be deposited, and therefore left unpaid until the procurement of the release of the mortgage? not aware, when he subscribed the notes, that several years would perhaps elapse, before the vendor would be entitled to claim the amount thereof? Why, then, did he consent that the notes should bear interest from date, notwithstanding the delay which was necessary to be experienced by the vendor in exercising his right to demand payment? The answer to these inquiries suggests itself to the mind in the simple idea that the parties understood, at the time of the act, that the existence of the mortgage, and the delay occasioned thereby in the discharge of the vendee's obligation, should form no impediment to the purchase moneys bearing the interest stipulated in the contract: nay, that such interest should be considered as a part of the price. Viewed in this light, the conclusion is irresistible, that the interest claimed must be paid as a part of the consideration of the sale.

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But is it true that under our present system of laws, the plaintiff has no right to claim the conventional interest, or that arising ex mora, but from the time that the property sold was disencumbered from the mortgage existing thereon at the time of the sale? Here, it is shown, not only that interest is due from the terms of the contract, but also that the property sold was susceptible of producing revenue by being rented; and art. 2531 of the Civil Code declares in positive terms, that "the buyer owes interest on the price of the sale until the payment of the capital, if it has been so agreed at the time of the sale, and if the thing sold produces fruits or any other income." Art. 1933 says, also, that "when the sum is due for property yielding a revenue, interest is due from the time the principal is payable, without any demand." And under art. 2537, the purchaser is allowed to relieve himself from the payment of interest, by depositing the price due by him. Is it not clear from these provisions, that nothing can discharge the vendee from the payment of interest on the unpaid price of property producing revenue, when that interest arises ex mora, or from complying with his stipulated obligation to pay conventional interest according to his contract, but his depositing the amount of the price? In vain has it been urged, that the buyer who has just reason to fear that he will be disquieted by an action of mortgage, may suspend payment of the price. Civ. Code, art. 2535. Here such payment was suspended by the very agree-The duration of the suspension was proviment of the parties. ded for by the contract. The vendee had during that time the free and full enjoyment and possession of the property; and never showed himself ready to pay the price on demanding security, or by depositing it according to law. He had the use of the vendor's money for a long space of time, and it would seem unjust to permit him to enjoy, at the same time, both the price and the thing sold. Without its being necessary to comment any further on the provisions of our Code, as applicable to the present case, we shall refer again to the case of Ball et al. v. Le Breton et al. already quoted, in which, after full investigation of the point in controversy, we held, that although the purchaser in such circumstances has the right of suspending the payment of price, yet such right to withhold or suspend payment does not necessarily

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imply a forfeiture of any part of the debt or of its accessories, and that the purchaser who wishes to relieve himself from the payment of interest, must avail himself of the faculty given him by the Code, of depositing the price by him due.

Judgment affirmed.

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JOSEPH LANDRY v. THE PRESIDENT AND DIRECTORS OF JEF-FERSON COLLEGE.

Where on an appeal from a judgment confirming one taken by default, the record contains no statement of facts, and the certificate of the cierk shows that parol evidence was produced on the trial, but not taken down in writing, it will be presumed that plaintiff's claim was proved by legal evidence before the judgment by default was made final.

Where the testimony introduced on the trial has not been taken down in writing, the party intending to appeal must require the adverse party, or his counsel, to draw, jointly with him, a statement of the facts proved, to be annexed to the record. C. P. 602. It is only when the other party refuses to join in making out such a statement, or when the parties cannot agree, that the party intending to appeal has a right to call upon the court for a statement of facts. C. P. 603.

APPEAL from the District Court of St. James, Nicholls, J. Michel, for the plaintiff.

M. Taylor and B. Winchester, for the appellants.

Simon, J. The defendants are appellants from a judgment by default regularly taken against them, and made final after the expiration of three judicial days from the day it was entered. The plaintiff's claim being based on a draft for \$325, accepted by the treasurer of Jefferson College, to be paid by that institution, he had only to prove the signatures of the treasurer and of the drawer and endorser of the draft. As from the certificate of the clerk of the court, a qua, it appears, that parol evidence was produced, but not taken down in writing at the trial, we must presume that the plaintiff's claim was duly proved by legal evidence before the default was made final; and as the record comes up without any statement of facts, and with the mention in the clerk's cer-

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tificate that the parol evidence was not taken down, we cannot examine the case on its merits. 6 La. 124.

But the appellants have assigned as error apparent on the record, that the inferior court improperly refused to make a statement of facts immediately after the judgment appealed from was rendered, when so required to do by the counsel for the defendants.

The record shows, that on the day on which the judgment was made final and signed, the defendants' counsel moved the court to make a statement of facts, for the purpose of appealing to this court, which application was refused by the Judge, a quo, on the grounds among others, that the inferior court is not obliged by law to make any statement of facts, and that the defendants, having made no appearance, either by answer or exception, are not entitled to the same; to which refusal of the Judge the defendants took a bill of exceptions.

We have often held that, under article 586 of the Code of Practice, the inferior Judge is explicitly permitted to certify to those things which are of record in the suit; and that if there be any evidence introduced, of which record is not made at the time of the trial, this court can only act on it through a statement of facts agreed on by the parties, or made by the Judge if they disagree. 3 La. 294. 10 Ibid. 562. For that purpose, article 601 of the same Code, authorizes either party to require the clerk to take down the testimony in writing, which shall serve as a statement of facts, if the parties should not agree to one. not done in this case, as appears from the clerk's certificate: and. under article 602, when the testimony has not been taken down in writing, the party intending to appeal must require the adverse party, or his advocate, to draw, jointly with him, a statement of the facts proved in the cause, to be annexed to the record, and a transcript thereof to be transmitted to this court. The following article (603) provides that, if the adverse party, when required to do so, refuse to join in making out the statement of facts, or if the parties cannot agree, the court, at the request of either, shall make such statement, according to their recollection of the facts, &c. It is clear from these provisions, that the party who wishes to appeal must first apply to his adversary, and has no

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right to call upon the court for a statement of facts, unless he can show that he has vainly attempted to get the adverse party to join him in making one. Here, the appellants have shown no such attempt; and the Judge, a quo, was not bound to grant their request. We cannot, therefore, investigate this case on its merits. 4 La. 8. 2 Ibid. 347.

Appeal dismissed.

ABRAM BIRD and others v. Julia Doiron and Husband.

In every action on a joint contract all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. C. C. 2080.

APPEAL from the District Court of East Baton Rouge, Johnson, J.

Elam, for the plaintiffs.

Burk and Avery, for the appellant.

MARTIN, J. The plaintiffs are two surviving partners of the firm of Thompson W. Bird & Co., and the heirs of two deceased partners of that firm. They allege, that the defendant, Julia, was a joint owner with five others, of a plantation which had theretofore been improved as a cotton plantation; that believing it would be more for their interest to employ the plantation and their slaves in the cultivation of sugar, they borrowed from the plaintiffs' firm the funds requisite to erect the buildings, which the new culture rendered necessary; that the plaintiffs instituted a suit against the defendant Julia and her joint owners, in which they recovered from each of them, except the defendant Julia, their virile proportion of said funds; but judgment was given against them, in favor of the latter, (4 La. 305,) the court intimating the opinion that she could not be made liable under the form of action which had been resorted to.

The present suit is brought to recover from her that virile portion of the funds borrowed, which, as a joint owner of the plantation improved with the plaintiffs' money, she is bound to reim-

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The plaintiss probed her conscience, and her answer to their interrogations disclosed that she claimed to be a creditor of the insolvent estate of A. Richard & Co., her joint owners; that she was advised that her right attaches to the land and slaves in kind, or at least to the proceeds thereof; that she is advised that she was a joint owner of the plantation and the appurtenances surrendered, and in that sense co-partner; but that she was not, nor is a partner of A. Richard & Co. She admitted that the plantation, which had been previously employed in the culture of cotton, was, after the necessary buildings had been erected, cultivated as a sugar estate. She declares herself ignorant of the plaintiffs' loan to A. Richard & Co., and of the money thus borrowed, (if the loan was made,) having been employed in the erection of the sugar house, or for other purposes beneficial to the plantation, or from whom the money employed in the erection of those buildings, &c. was obtained. She concluded by stating that the right she claimed in her opposition to the surrender, or rather to the tableau of distribution of the syndic of Richard & Co., was that of natural and forced heir of her father, to the plantation surrendered, and that, in this sense, she was a partner of the other heirs or their assigns, but not in any sense confounding her in the partnership of A. Richard & Co.

The defendant Julia filed the following exceptions to the plaintiffs' demand:

1st. The judgment in her favor in 4 La. 305, above cited, forms res judicata against it.

2d. Her joint owners ought to have been made parties to the present suit, and no judgment can be given against her in their absence.

3d. She is acknowledged as a creditor of A. Richard & Co., by their syndic, without any diminution of her claims by the plaintiffs' demand.

4th. And lastly, she pleaded the general issue.

There was judgment against the defendant Julia, and she has appealed. The record contains no evidence of an actual partnership between the defendant and appellant and her joint owners, nor of any of them having been authorized to contract debts for the others, in such a manner as to bind her. If the plaintiffs

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have any claim against her, it must be simply as a joint owner; in other words, a joint demand, which can only be enforced in a joint action, to which all the joint debtors must necessarily be parties. The Civil Code, art. 2080, provides, that in every suit on a joint contract all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. Thompson v. Chretien, 3 Robinson, 26. The court, in our opinion, erred. See Bourgerol v. Allard et al. 6 Robinson, 351.

It is, therefore, ordered, that the judgment be annulled and reversed, and that the plaintiffs' suit be dismissed, with costs in both courts.

Louis Le Page and others, Heirs of Urbain Le Page, v. THE NEW ORLEANS GAS LIGHT AND BANKING COMPANY and others.

District Courts have jurisdiction of an action by heirs to compel the transfer to them of stock owned by the deceased, where there are no debts due by the succession. Per Curiam: Such a case is not one of those enumerated in arts. 924, 925 of the Code of Practice as coming exclusively under the power and jurisdiction of Courts of Probate, which being of limited and special jurisdiction cannot take cognizance of matters which, though relating to a succession, are not placed by law under their immediate control and jurisdiction.

The heir acquires the succession of the person from whom he inherits immediately after the death of the latter. This right is vested in him by operation of law alone, before he has taken any step to put himself in possession. One of its effects is to authorize him to institute any action which the deceased had a right to institute, and to prosecute those already commenced. C. C. 934, 935, 936, 939. He cannot be required, in order to authorize him to sue, to show that he has been recognized as heir, and put in possession of the estate by a decree of the Court of Probates of the place where the succession was opened. All that can be required of him is to furnish satisfactory evidence of his right to inherit. The recognition of the heir by the Probate Court is only required where he seeks to compel a curator, executor or administrator to render an account. C. P. 1000, 1001, 1002, 1003.

APPEAL from the Parish Court of New Orleans, Maurian, J.

Le Page and others v. The New Orleans Gas Light and Banking Co. and others.

G. Strawbridge and Grymes, for the plaintiffs.

Grima and L. Peirce, for the appellants.

Simon, J. This suit is brought by the heirs and legal representatives of one Urbain Le Page, who died in the city of New Orleans, for the purpose of obtaining from the Gas Light Bank, the Bank of Louisiana, and the Louisiana State Bank, the transfer of a certain number of shares in the capital stocks of those Banks, alleged to have been owned by the deceased, and inherited by the petitioners.

The defendants admit that there is stock in their respective Banks in the name of the deceased, but they allege, that the plaintiffs must first be recognized by the Court of Probates as the heirs of the deceased, and that the District Court has no jurisdiction; and they deny that the plaintiffs are the heirs and representatives of Urbain Le Page, as by them alleged.

Judgment was rendered below in favor of the plaintiffs, ordering the transfer prayed for to be made; and the defendants have appealed.

The evidence establishes satisfactorily, that the plaintiffs are the legal heirs of the deceased. The latter never was married, and the petitioners are his parents, and brothers and sisters. It is also shown, that there are no debts due by Urbain Le Page in this State, and it is not pretended that he owes any elsewhere.

This is not one of the cases enumerated in articles 924 and 925 of the Code of Practice, as coming exclusively under the power and jurisdiction of the Court of Probates, which, being a court of limited and special jurisdiction, cannot take cognizance of matters which, though relating to a succession, are not placed by law under its immediate control and supervision. The plea to the jurisdiction of the District Court was, therefore, properly overruled.

But it has been insisted, that the plaintiffs cannot exercise the present action, unless they are ready to show that they have been duly recognized as the heirs of the deceased, and put in possession of his estate, by a regular decree of the Court of Probates of the place where the succession was opened. Nothing shows that this estate ever was put under the administration of a curator, administrator, or testamentary executor appointed by 'the Court

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of Probates; and under art. 1000 of the Code of Practice, the recognition of the heirs before the Probate Court, appears only to be required in cases where the heirs seek to compel a curator, administrator, or testamentary executor to render an account of his administration. Code of Pract. arts. 1001, 1002, 1003. Now, by express provisions of our law, the lawful heir of a deceased person acquires the succession immediately after the death of the latter; and this right is vested in the heir by the operation of the law alone, before he has taken any step to put himself in possession. "Le mort saisit le vif;" and one of the effects of this right is to authorize the heir to institute all the actions which the deceased had a right to institute, and to prosecute those already commenced; for, the heir, says the law, represents the deceased in every thing and is of full right in his place, as well for his rights as his obligations. Civ. Code, arts. 934, 935, 936, 939. This doctrine was fully recognized in the case of Addison v. The New Orleans Savings Bank, 15 La. 528, in which we held, that all that can be required of the heir, is to furnish satisfactory evidence of his right to inherit; and such right has been proven in this case.

We must remark, however, that there was perhaps no necessitv for instituting the present action; as from the laws above referred to, it is clear, that the plaintiffs, having acquired the succession of the deceased immediately after his death, and by the operation of the law alone, were vested with the right of considering the stock by them claimed, as their property, and of disposing of the same as their own, from the moment that the succession was opened. If so, what transfer do they want from the Banks? Their title to the stock is complete; and it seems that it would have been sufficient for them to present to the Banks the certificate of stock of the deceased, in order to obtain from them the substitution of their names to that of the deceased, on the books of those institutions, without its being necessary to resort to an action for that purpose. A stockholder is not a creditor until he becames entitled to a dividend, which, on being refused, might be the cause of an action against the Bank; but it is obvious that no new certificate of stock can be issued in the names of the plaintiffs, until they produce to the Banks the certificates Vol. VII. 24

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formerly delivered to their ancestor, or show that none exist, or that they have been lost or mislaid. However irregular and unnecessary the course pursued in this case may have been, no exception was taken below to the plaintiffs' action, which, on the contrary, was tried on its merits under the issues set up by the defendants; and as it does not behove us to decide the case upon any other point than those presented by the pleadings, all that we can say here is, that the plaintiffs have shown themselves legally entitled to be recognized as the owners of the stock admitted by the defendants to be in the name of, and possessed by the deceased in their several institutions.

Judgment affirmed.

LEWIS v. JESSE CARTWRIGHT.

In an action instituted by one held as a slave to establish his right to freedom, the only issue which can be presented is liber vel non. Plaintiff cannot contest the title of the defendant but by establishing [his] own right to freedom. A slave is incapable of appearing in court for any other purpose than that of claiming his freedom.

APPEAL from the District Court of the First District, Buchanan, J.

Van Matre and Schmidt, for the appellant.

Larue and Preston r the defendant.

Bullard, J. The plaintiff claims his freedom, on the ground that he was carried by his master from the United States into Texas, at that time one of the States of the Mexican confederation, where slavery, as he clieges, was not tolerated by the constitution and laws at that time in force. He is appellant from a judgment against him, rejecting his pretensions. The only part of the "constitution and laws" which have been furnished us, is the constitution of the State of Coahuila y Tejas, which appears to have been adopted on the 11th of March, 1827. The 13th article contains the following disposition: "En el estado nadie nace esclavo desde que se publique esta constitucion en la cabecera de cada partido, y despues de seis meses tampoco se permite su introduccion bajo ningun pretesto."

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This article of the constitution of that State by no means declares that slavery shall no longer exist, but provides, on the contrary, for its gradual extinguishment, by declaring the children born of slave mothers, after the publication of the constitution, to be absolutely free, and prohibiting the further introduction of slaves from abroad six months thereafter. It is clear, that such slaves as existed in that State previous to the establishment of the consitution, did not thereby become free.

But even admitting that such persons as were introduced afterwards in violation of that prohibitory clause in the constitution, became *ipso facto* free, the evidence in this case is quite vague, as to the time at which the plaintiff was carried to Texas. The only witness who testifies upon that point says, that he (the witness,) resided in Texas from 1822 to 1828, during the whole of which time that State formed an integral portion of the Mexican Republic; that he knows the plaintiff, and recollects having hired him of Prior to aid him in clearing some land, in the neighborhood of St. Philip de Austin, about the year 1826; that he was in his employ for two or three weeks; and that he saw him frequently during the ten or twelve months afterwards. Prior called himself his master.

Thus it appears that the plaintiff was in Texas, with his master, before the adoption of the constitution, and could not consequently have acquired his freedom by being introduced afterwards. Indeed, there is no evidence of his having been carried to Texas, after the spring of 1827.

The counsel for the appellant contends, that the court erred in giving judgment for the defendant, without proof that he had any title to the plaintiff as his slave, but with evidence, on the contrary, that if a slave at all, which is denied, he belongs to one Roberts.

The plaintiff has no capacity to contest the title of the defendant. The only question properly presented by the pleadings, or which could be presented, was liber vel non. Slaves are incapable of appearing for any other purpose. 4 Mart. 577. 8 lb. 158. 9 La. 158.

Judgment affirmed.

Gerl and another v. The Commercial Bank of New Orleans.

Joseph Gerl and another v. The Commercial Bank of New Orleans.

By sect. 33 of the act of 1 April, 1833, incorporating the Commercial Bank of New Orleans, that institution is authorized to lay pipes in the streets of New Orleans for the purpose of supplying water for the use of the inhabitants, on the condition of restoring the streets, in as short a time as possible, to the condition they were previously in. Defendants having neglected to replace the pavements in certain streets in which they had laid pipes, the city authorities, through certain persons subrogated to their rights against the Bank, caused the pavements to be replaced. In an action by the latter against the Bank for the cost of the repairs: Held, that a notice to defendants that the pavements had not been properly replaced, and a demand of them to comply with the requisitions of the charter by repairing the streets, was indispensable to a recovery.

APPEAL from the Parish Court of New Orleans, Maurian, J. Bodin, for the plaintiffs.

Maybin, for the appellants.

BULLARD, J. The charter of the Commercial Bank, which authorized that institution to lay down pipes in the streets of the city of New Orleans, for the purpose of conducting water for the use of the city and its inhabitants, made it the duty of the corporation to restore the streets to the same condition they were in before commencing their operations, within the shortest delay; and, in case of their failure to do so, the municipal authorities were authorized to do it, at their expense. The plaintiffs contracted with the First Municipality for cleaning the streets, and repairing the pavements for five years, from and after the 1st November, 1839, with a subrogation, as expressed in the city ordinances, to any recourse which the Municipality might have against the Bank, in the event of their failing to replace the pavement, as provided for by their charter; and they allege, that they have done paving to the amount of \$515 77, which the Bank was bound to make, but neglected to do, though regularly requested, and legally put in default.

The present action was brought to recover that amount; and the Bank is appellant from a judgment which condemned them to pay it.

The counsel for the appellants has made two points in this

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court: first, that the defendants were not put in default; and secondly, that they have complied with their charter, by putting the streets in the same order in which they were previous to the laying of the pipes.

I. By a putting in default, in the present case, we understand a notice to the defendants, that the pavement had not been properly replaced, and a demand of them to comply with the requisitions of the charter, by repairing the streets wherever they were defective in consequence of their neglect. Such a demand was indispensable to a recovery in the present action. The evidence on this part of the case is a letter dated October 31, 1839, signed by the Surveyor of the First Municipality, addressed to the Directors of the Water Works, in which they are informed that upon inspection by Messrs. Bell, Mondi, Cook and the Surveyor, it had been ascertained, that the laying down of the pipes imposed upon the company the charge of repairing the pavement in the places indicated in the table thereto annexed, and informing them, that as the new undertakers for repairing the streets are to commence their operations on the 1st of November, they are requested to make the repairs which they were bound to do, as soon as possible. It was not until the following May, that the contracors were formally notified that the Bank was in default in making the necessary repairs, and that orders were given them to have the work done in conformity to the ordinance. The table particularizing the places where repairs were required, was very explicit. We concur with the court below in the opinion, that this was a sufficient putting in default.

II. Upon the merits, an attentive examination of the evidence has failed to satisfy us, that the judgment is so evidently erroneous as to authorize our interference.

Judgment affirmed.

Ducloslange v. The New Orleans and Carrollton Railroad Company.

PHILIP DUCLOSLANGE v. THE NEW ORLEANS AND CARROLL-TON RAILROAD COMPANY.

APPEAL from the District Court of the First District, Buchanan, J.

Grivot and Elwyn, for the appellant.

T. Slidell, for the defendant.

L. Peirce, for the warrantors.

MORPHY. J. This case turns upon the construction of a clause in the olographic will of the late Philip Ducloslange, the plaintiff's father, executed in 1820. The deceased, among other testamentary dispositions, made a partition in kind among his natural children, of an irregular piece of ground owned by him, being square No. 77 of the suburb Annunciation. He made out and . annexed to his will a plan of the property, on which he marked along the dividing line, the front and depth of the lots, or divisions, he proposed to make. In the body of his will he declares, that the division No. 3, which he gives to Furcie, alias Philip Ducloslange, the present plaintiff, is composed of the two centre lots. measuring together, 120 feet front by 160 in depth; while on the plan to which he refers, the length of the side lines, or depth of the lots. is marked as being only 120 feet. On the 6th of August, 1835, the plaintiff subdivided his portion of the land into four lots fronting on Polymnia street, with a depth of 120 feet. He declared, in the sale, that he had acquired this property by inheritance from the estate of Philip Ducloslange, and that it was designated in the plan annexed to his last will as division No. 3. Some time after, Edouard Ducloslange, the brother and co-heir of the plaintiff, failed, and, among other property, surrendered to his creditors a portion of division No. 1, which had been allotted to him by his This portion, which adjoins the rear of one of the two original lots of division No. 3, assigned by the will to the plaintiff, is described as having a front of sixty feet, by a depth of about eighty feet. At the public sale of the insolvent's estate, it was adjudicated to the defendants, who have since been in possession. Of this piece of property the plaintiff now claims a space of forty feet by sixty, which he alleges he had reserved for his own

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use and benefit when he sold the front lots with a depth of 120 feet, and which he avers was unlawfully and wrongfully sold by the syndic as belonging to the property of Edouard Ducloslange. There was a judgment below in favor of the defendants, from which this appeal has been taken.

The question before us may be considered as entirely one of fact. What was the intention of the testator? Did he intend to give to the two lots assigned to the plaintiff a depth of 160 feet as written in the will, or one of 120 as written on the plan to which the will refers. We incline to the opinion of the Judge below, that the depth intended to be given by the testator to the plaintiff's lots, was that expressed on the plan. The probability is, that before writing out that part of his will in which he divides the square, the deceased had prepared the plan which he annexed to it, and to which he refers. All the admeasurements mentioned in the will correspond with those marked on the plan. with the exception of the depth of these two lots, in relation to which the discrepancy exists. It is well known, that according to the original division of the squares in the city and suburbs. the ordinary size of a full lot of ground was sixty feet front by a depth of 120 feet. It is reasonable to suppose that they were lots of such dimensions which the testator had in view, when he declared that the division No. 3, which he assigned to plaintiff, was formed of the two centre lots (les deux terrains du milieu) as marked on the plan, and that it was through mistake he gave them the unusual depth of 160 feet. This is the more probable as such a depth would leave the lot of Edouard Ducloslange, on the other side of the irregular square, with the still more unusually small depth of forty feet. This seems to have been the understanding of the plaintiff himself, and of his co-heirs. Had he thought himself entitled to a depth of 160 feet in 1835, it is difficult to believe that he would have sold his lots with only a depth of 120 feet, and would have reserved a small portion of ground without any issue, and completely enclosed by surrounding lots. The language, moreover, which he made use of, does not at all convey the idea that he was reserving any part of the ground he owned in the square, but, on the contrary, that he was selling all that he then believed that he did own. He describes

the property as being that which he inherited from his father, and refers to the very plan which limits his depth to 120 feet. At a subsequent period, when Edouard Ducloslange had failed and surrendered the property now held by the defendants, it was described in his schedule as having a depth of about eighty feet, which it could not possibly have if the plaintiff's lots had really a depth of 160 feet, the whole width of the square at that place being only about 200 feet. 'The plaintiff, who was a creditor of the insolvent, and was made a party to the proceedings, suffered the property to be advertised and sold to the defendants, as described in the schedule, and never made any opposition. From all these circumstances we are satisfied, that the inferior Judge has not mistaken the intention of the testator; and that it was understood in the same way, and'so acted upon by the plaintiff himself, and his co-heirs.

Judgment affirmed.

JOHN PARKER v. GEORGE McGILWAY and others.

Where one who has undertaken to erect buildings for a certain price, and to have them completed by a particular period, fails, by his fault, to comply with his contract, in consequence of which the other party, under a clause in the contract, annuls the contract and recovers possession of the unfinished buildings, he cannot recover the value of materials, such as door and window frames and other joiner's work, not in the buildings, and which were never tendered to the owner of the buildings, nor in any way used by him.

Appeal from the District Court of the First District, Buchanan, J.

Gedge and L. Peirce, for the appellant.

Sever, Bartlette and Hoa, for the defendants.

GARLAND, J. The plaintiff alleges, that in the month of June, 1841, he entered into a contract with McGilway, to build two dwelling houses in Dauphine street, of a certain height and dimensions, which were to be completed in a workmanlike manner, on or before the 15th of October in the same year; for which he was to pay the sum of \$15,000, in different instalments. The

first, of \$3000, he avers that he has paid. The others, he alleges he is not liable to pay, as the contract has not been complied with, and the said McGilway is unable to perform it, and has neglected or refused to do so. He avers, that he has called upon him to give up the contract, so that he may employ some other person to complete the houses, but that McGilway refuses either to do so, or to complete the undertaking. He, therefore, prays, that a writ may be issued, to put him in possession of the premises; that the contract may be annulled; and that he may recover \$10,000 damages. He also prays, that as John Walker and Lawrence Gurvey are the sureties of McGilway, for the faithful compliance with his contract, they may be made parties, and that he may have judgment against them. He further avers, that it has been supposed that he owes the second instalment of \$2800. which is not true; and that he has in consequence been sued, in conjunction with McGilway, for materials furnished him by Newton Richards, and Forstall, Roman & Co. He therefore prays, that they also may be made parties, and their claims, as against him. dismissed.

The defendant, McGilway, after a general denial of such allegations as are not specially admitted, answers, that he did enter into the contract annexed to the petition, and was going on to execute it, and had made considerable progress in so doing, when he was interrupted by the plaintiff, who ordered him and his workmen away from the premises, threatening to imprison them, and endeavored to take possession thereof, and finally obtained an injunction to arrest his proceedings, which he got dissolved after much trouble and delay; and that he otherwise interrupted him in his efforts to complete the contract. He further avers, that by the conduct of the plaintiff, and his misrepresentations as to the unwillingness and inability of the defendant to comply with the contract, he (defendant) has suffered heavy damages, by loss of credit, and has also lost a large amount of the profits he expected to make. He further alleges, that he has done a great deal more work on the buildings than the plaintiff has paid him for, in consequence of all which, he is entitled to claim of him the sum of \$15,000, which he does by a demand in reconvention.

The two sureties of the defendant answered by a general de-Vol. VII. 25

nial; and claim to be discharged in consequence of the course pursued by the plaintiff towards McGilway, whose grounds of defence they adopt. Roman, Forstall & Co. aver, that they have a judgment against McGilway for materials and supplies furnished to enable him to construct the buildings, which cannot be affected or annulled by this proceeding. The other defendant, Richards, filed no answer at all.

The building contract was given in evidence. It details specially the work to be executed, and states, that the undertaker is to furnish the materials of every description, do all the work, and have the whole establishment completed on or before the 15th of October, 1841, ready for delivery; and if not then ready, McGilway stipulates to pay a rent of \$200 per month, until the houses are completed, and also binds himself in a penalty of \$10,000, to comply with all his obligations. There are many stipulations not necessary to mention, but the houses were to have a depth of forty-one feet in the clear, and the two first stories to be thirteen feet in height between the floor and joists; the price to be \$15,000, payable in several instalments; and there is a clause which stipulates, that in case of difficulty between the parties, or if from any cause the progress of the buildings be threatened with delay. the plaintiff shall have the faculty of taking immediate possession of them and continuing the work, without prejudice to the eventual rights of the parties.

The parol evidence shows, that McGilway commenced the work and progressed with it until some time in the month of July, 1841, when he became somewhat irregular in the prosecution of it, so much so, as to attract the notice of different individuals and of the plaintiff, who began to be apprehensive, that the work would not be finished in October, and that he should thereby lose the opportunity of renting advantageously, until the commencement of another season. He, therefore, on the 24th of July, 1841, wrote to McGilway, informing him, that for some four or five days past, the work upon the buildings was nearly suspended, and of the consequences that would result from the houses not being ready to receive tenants in October; he calls his attention to the necessity of an immediate prosecution of the work, and to the clause in the contract which authorized the

plaintiff to take possession, and continue the work. He states, that he is not desirous of executing this clause, but that, if the suspension continues much longer, he will be compelled to do so. What answer was given to this letter is not shown; but upon the 7th of August following, the plaintiff again wrote, saying, that notwithstanding his urgent and repeated remonstrances against delay, nearly three weeks had elapsed since any thing of consequence had been done. He repeats what was said in the first letter, and adds, that it was then almost physically impossible to complete the houses within the time mentioned; he, therefore, informs him of his intention to take immediate possession of the buildings, to seek another contractor, and to hold him answerable for all extra cost, expenses, and damages. He also informs him, that at an early day, two master builders will visit the premises to measure the work done, and assess its value. sureties were also notified of this intention and proceeding. appears that McGilway resisted the taking possession of the houses by the plaintiff; and that, on the 25th of the month last mentioned, the plaintiff again wrote, remonstrating against the delay, and telling the contractor, that he was unable to complete his contract, and that the suspension of operations still continued; wherefore he again demanded the possession of his property, and warned him of the consequences. He also proceeded to point out several variations from the contract, to wit, that the houses were only thirty-eight feet deep instead of forty-one; and that one story was only twelve feet pitch or height, instead of thirteen feet; and also, that some of the materials were not of the quality stipulated. The contractor still refused to give up the houses, and did some work on them; when, on the 18th of October, the term having elapsed entirely, the plaintiff again demanded possession of his property. It was still withheld, and he did not get it until the 11th of November, when he was put in possession by the Sheriff, under an order of court. It is further shown, that about the time when McGilway entered into this contract, and subsequently, he was much in want of money, and that several persons withdrew the credit they had formerly given him, and refused to furnish materials, or to do work, unless security was given. The first instalment of \$3000 was paid on the 10th of

July, 1841, and it is not shown that the work was sufficiently advanced before the difficulties commenced, to entitle the contractor to another payment. It also appears, that the plaintiff, in August, after his first notice to McGilway, engaged another undertaker to finish the work, but that he could not do so, as McGilway kept possession.

On the part of the contractor it is proved, that he commenced the work with considerable vigor, and prosecuted it for some time in a satisfactory manner. Some of the witnesses say, that if he had been paid the second instalment of \$2800, he could have completed the work in time, and have made money, some say as much as \$3000. On the other side it is proved, that he would have lost largely by the contract, under any circumstances. When the plaintiff first went to take possession, some persons were at work on the houses, who went away in consequence of his threats of putting them in prison; and afterwards, although work was resumed, it does not appear to have progressed rapidly. McGilway continued to be embarrassed, and his situation at the time of the trial was far from being prosperous. When the plaintiff got possession of the houses in November, it is proved that the work which had been done by the contractor was worth \$5090; and there were in his shop, flooring plank, door and window frames, doors, window sashes, and other joiners' work of the value of \$1000; but it is not shown that the plaintiff ever used it, or that these things were ever tendered or delivered to him.

The Judge allowed the \$5090 for the work on the houses, as on a quantum meruit. He deducted from it the \$3000 paid; he also deducted \$173 33 for twenty-six days rent, or demurrage, at the rate of \$200 per month, and \$300 for a partition wall in an adjoining house; and allowed \$1000 for the joiners' work, consisting of doors, sashes, door and window frames, and flooring, on hand at the defendant McGilway's shop. This left a balance of \$1616 67, for which McGilway had judgment against the plaintiff, on his demand in reconvention; from which the plaintiff has appealed.

We have attentively examined the mass of testimony in this case, and cannot agree with the District Judge in his conclusions.

It is not disputed that the sum of \$5090 is correct, nor that \$3000 has been paid, nor that McGilway is bound to pay \$300 for the partition wall. 'The sum of \$1000, and that of \$173 33, are contested. The plaintiff avers, that he ought not to pay the first named sum, because he never had the materials delivered or tendered to him, for which it is charged; and because no order is made that they shall be delivered in case it is paid; and further, that it was McGilway's fault and negligence which prevented them from being used. We think this objection well founded, and that the court erred in allowing it. McGilway has not, in our opinion, proved that he was sufficiently diligent Upon him, therefore, the loss in the discharge of his contract. of the materials must fall, if they have been really lost. He had the buildings in his charge and possession for nearly a month longer than the contract stipulated; and when taken from him, they were not half finished, and it was necessary to engage other workmen to complete them, which cost the plaintiff about \$11,600 The new contractor made no use of these materials, which were not on the premises, but in McGilway's work-shop; and it is not shown that he made their existence known, at the time the estimate was made of the value of the work and materials on the lots in Dauphine street. If he had, it is probable they would have been included in the statement made up by the two master builders. The value of these materials and work is stated in very general terms by the witnesses. do not pretend to have made any measurements or calculations, but guess at the value of the flooring plank in one place, and the door and window frames, window sashes, &c. in the shop at an-We cannot, upon evidence so vague and general, condemn the plaintiff to pay for materials and work which it is not pretended that he ever had the benefit of, or used in any way.

Under all the circumstances of the case, we do not feel disposed to increase the amount for the rent or demurrage allowed by the District Judge, believing that, from the testimony, he has done substantial justice between the parties.

The judgment of the District Court is annulled and reversed, and it is ordered and decreed, that the defendant, George McGilway, on his demand in reconvention, do recover of the plaintiff,

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John Parker, the sum of sixteen hundred and sixteen dollars and sixty-seven cents, with interest at the rate of five per cent, per annum, from the 25th day of November, 1841, until paid, with the privilege and lien granted by law to undertakers and workmen, on the buildings described in the petition and contract annexed thereto; upon the payment of which sum and interest, the contract between the parties is to be discharged and annulled; and in all other respects the several demands and claims set up by the parties are rejected. The plaintiff, Parker, paying the costs in the court below; those of the appeal to be paid by the defendant and appellee.



THE STATE v. THE ATCHAFALAYA RAILROAD AND BANKING COMPANY.

A notary is entitled to charge for an inventory executed out of his office, fifty cents for every hundred words; but he is not entitled to any allowance for memoranda made and attested by him for the purpose of preparing the inventory in proper form. For an attested copy of any act not proved to have been made out of his office, he can charge but twelve and a half cents for every hundred words. Act of 28 March, 1813, s. 8.

By sect. 13 of the act of 14 March, 1842, for the liquidation of banks, it is provided, that it shall be the duty of the notary employed to make an inventory of the property and effects of the bank, and at the time of making such inventory, to destroy, under the inspection of the commissioners and of the board of currency, all the notes of the bank which may be on hand at the time, including such as may not be completed, in the presence of two witnesses and of the officers of the bank, if any be present, of all which mention shall be made in the inventory. Held: that the services required of the notary by this provision, are a part of the labor of making the inventory, and that he is entitled to no additional compensation therefor.

APPEAL from the District Court of the First District, Buchanan, J.

Christy, appellant, pro se.

Hoffman, for the commissioners.

BULLARD, J. Pending the proceedings in this case to annul the charter of the Bank, William Christy, notary public, who had been employed to make the inventory of the property and assets

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of the institution, took a rule on the commissioners to show cause why they should not pay him the sum of three thousand dollars out of the moneys in their hands, by privilege, the same being the amount of fees due to him for taking an inventory of the money, property and effects of the defendants in this case. The bill accompanying this rule was in the following form:

"The Commissioners of the Atchafalaya R. R., &c.

"To William Christy, Notary Public, Dr.

"To taking inventory of the money, property and effects of the said Bank, and making two copies thereof, making in all about 600 pages of foolscap paper, three thousand dollars . . \$3000."

The commissioners excepted to the demand on the ground that it was made in a round sum, and does not detail the services rendered. Thereupon the plaintiff in the rule filed a detailed account, the first item of which is \$824 58, for taking the inventory in two originals, &c., each containing 82,458 words and figures, at fifty cents for each 100 words and figures, the same having been made out of the office of the notary. The second item is \$206 14 for making a copy, at twenty-five cents per hundred words and figures. The third item, \$2000, is for extra services in cancelling and burning the notes of the said Bank, amounting in all to \$1,648,810, signed and unsigned, and paraphing and paging books, papers, &c., according to the 13th section of the liquidating act, passed by the Legislature of this State. The total of the detailed account was \$3030 70.

The court reduced the first item to \$451 29, allowing for one original at the rate of fifty cents per hundred words, made out of office, and for thirteen notarial attestations, also out of office, three dollars each.

This appears to us conformable to the Explicit Fee Bill. See Bullard & Curry's Digest, 443. One of the originals charged, consisted of memoranda taken by the notary and attested by him, to serve as materials for drawing out the inventory in proper form. The notary was allowed for each attestation three dollars.

The next item was reduced one-half, because it did not appear that the copy was made out of the office of the notary. The Fee Bill allows at the rate of twelve and a half cents per hundred words for copies with attestation. The State v. The Atchafalaya Railroad and Banking Company.

The charge of \$2000 for extra services in cancelling and burning the bank notes, was rejected in toto, as unauthorized by law.

The 13th section of the act of 1842, entitled "An act to provide for the liquidation of Banks," makes it the duty of the notary, at the time of making the inventory, immediately and on the spot, to cancel and destroy, under the inspection of the Commisers and the Board of Currency, all the notes of said Bank which may be on hand at the time, even those not yet completed, if such there be; and this in presence of two witnesses, and of the officer or officers of the Bank, if any be present : of all which mention shall be made in the inventory. The preceding section authorizes the commissioners to take possession of all the effects The responsibility resulting from this custody of of the Bank. the property of the Bank rests entirely on the commissioners. The property is not confided for a moment to the care of the notary. It is his duty to destroy the bank notes on the spot, as soon as they are entered upon the inventory, and to make mention of the fact in the inventory. The certificate of the fact of burning or otherwise destroying the notes, formed a part of the inventory. 'The labor of merely destroying the notes is not as great as it would have been to number and file them, as is usual with papers which are to be inventoried, and as is required by the Code. See Civ. Code, art. 1097. The only difference between these inventories of Banks and other public inventories is, that in relation to the notes of the Banks found on hand, they are to be destroyed, instead of being put up in bundles and numbered; and we are not prepared to say that notaries can recover, as upon a quantum meruit, for these small services, which form an essential part of the labor of making an inventory as required by law.

But it is urged by the appellant, that the Sheriff was allowed by the court \$1000 as sequestrator, and that his labor and responsibility were less than those of the notary. The case of the Sheriff is not before us, and, therefore, we cannot institute any comparison between the two claims; but, if the Sheriff had the custody of the sequestered assets of the Bank, he was entitled by law to a just compensation, to be determined by the court. Code of Pract. art. 283. His allowance may have been extravagant in this case, and he probably followed the common rule,

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never to lose anything by not asking for enough; but it certainly forms no standard by which to regulate the fees of the notary.

Judgment affirmed.

NATHAN VAN HERN v. GEORGE TAYLOR and others, Owners of the Steamer George Collier.

In an action against the owners of a steamer to recover the value of property shipped on their boat, and not delivered pursuant to the bill of lading, where the defence is that the property was lost in consequence of 'a collision with another boat, without defendants' fault, evidence is admissible to show that the property was lost in consequence of the collision, without any fault or negligence on the part of defendants or their agents, and that the accident was unavoidable. Per Curism: If there was no fault or carelessness on the part of the defendants or their agents, and it was out of their power to prevent the collision, the accident must be considered unavoidable, and one of the dangers of the river within the meaning of the bill of lading, for which the carriers are not responsible. C. C. 2725.

Appeal from the Parish Court of New Orleans, Maurian, J. T. A. Clarke, for the plaintiff.

Randall, for the appellants. The court erred in rejecting evidence to show that the loss resulted from an unavoidable accident, for the consequences of which defendants are not responsible. Civ. Code, art. 2725. 1 Phillips on Insurance, 635-6. Story on Bailments, 332. Abbott on Shipping, part 3, ch. 4, s. 5, p. 256. Hale et al. v. Washington Ins. Co. 5 Law Reporter, 201. 14 Peters, 99.

Morphy, J. This is an action to recover the value of some hogsheads of tobacco, shipped on board of the steamboat George Collier, from divers points on the river Mississippi, and which were not delivered in New Orleans pursuant to the bill of lading. The defence set up is, that the defendants are not liable, because their boat, without their fault, or that of the persons having charge of her, was run foul of on her voyage down the Mississippi, by the steamboat Emperor, then going up the river, by which collision and unavoidable accident the plaintiff's tobacco was thrown overboard, and either lost or damaged, &c. There was a judg-Vol. VII.

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ment below in favor of the plaintiff, from which the defendants have appealed.

On the trial of the case, the testimony of several witnesses was offered to show, that the plaintiff's tobacco was lost in consequence of a collision which took place between the George Collier and the steamboat Emperor, without any fault or negligence on the part of the defendants or their agents; and that the collision was an unavoidable accident, &c. This testimony, being objected to by the plaintiff, was rejected by the inferior Judge, on the ground, that the collision of itself is not one of those unavoidable accidents or dangers provided for in the bill of lading. testimony was, in our opinion, improperly excluded. A common carrier is responsible for the loss or damage of things entrusted to his care, unless the same is occasioned by accidental and uncontrolable events. Civ. Code, art. 2725. The terms of the bill of lading free the defendants from any responsibility for losses happening from unavoidable accidents and dangers of the river. · Whether the collision was an accidental and uncontrolable event within the meaning of the Code, or was an unavoidable accident and danger of the river, as provided for by the bill of lading, must depend entirely upon the circumstances under which it happened. If there was no fault or carelessness on the part of those who had charge of the George Collier, and it was out of their power to have prevented the collision, we can see no good reason why it should not be considered as an unavoidable accident, and as one of the dangers of the river, within the meaning of the bill of lading. All the writers on the law of insurance mention the running foul of other vessels as one of the perils of the sea, and hold, that the insurers must make indemnity for any loss resulting from such accidents, when not imputable to the misconduct. or negligence of the master or crew of the ship insured. lips on Insurance, 635, 636. 2 Marshall, 493.

In Peters v. The Warren Ins. Co. it was held, that a loss by collision, without any fault on either side, is a loss by the perils of the sea, within the protection of the policy of insurance. 14 Peters, 99. And in 2 Sumner's Rep. 567, Judge Story describes "the dangers of the sea in a bill of lading, to be equivalent to perils of the sea in a policy of insurance." In Abbot on Shipping, we

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find the case of a ship in which goods were conveyed being run down in daylight and not in a tempest, by one of two other ships that were sailing in an opposite direction. As, under the circumstances, there was no blame imputable to the master or crew of the ship, the loss was held to fall within the meaning of the exception in the bill of lading, and to have happened by a peril of the sea. Part 3, ch. 4, p. 209. We, therefore, think that the inferior court erred in rejecting the testimony, offered to show that the tobacco, the value of which is sued for, was lost in consequence of a collision, and that such collision happened without any fault on the part of the defendants, or their agents.

It is, therefore, ordered, that the judgment of the Parish Court be reversed, and that the case be remanded for a new trial, with instructions to the Judge of that court, to admit the testimony offered to show the circumstances attending the collision mentioned in the defendant's answer. The plaintiff and appellee to pay the costs of this appeal.

Anatole Villeré v. John Græter and others.

Where in an action for damages for the loss of a slave drowned while engaged in an illegal traffic with defendants, no evidence is introduced to show the value of the slave, no judgment can be rendered in favor of plaintiff.

Before the act of 19th February, 1844, amending art. 2304 of the Civil Code, cotrespassers were liable jointly only, and not in solido.

APPEAL from the Parish Court of Plaquemines, Leonard, J. Lavergne, for the plaintiff.

Larue and C. K. Johnson, for the appellants.

Bullard, J. The defendants are appellants from a judgment against them, in solido, for \$500 damages, for causing the death of one of the plaintiff's slaves, by drowning, while engaged in a prohibited traffic with him and others, and encouraging them to steal sugar from their master to sell to them.

The record, while it shows that one of the slaves was drowned while engaged as alleged in the petition, contains no evidence whatever as to the value of the slave, and, consequently, there is

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no proof as to the *quantum* of damages sustained by the plaintiff.

The counsel for the appellee has endeavored to sustain the opinion of the Judge, in assuming the slave to be worth \$500, without any evidence, by what was said by this court in the case of Howe v. Manning's Executor, 13 La. 413. In that case the witnesses swore, that the plaintiff's services in taking care of a steamboat, were worth from six to eight dollars per day. The Judge did not believe them, and allowed only three dollars. This court said: "We have neither the power, nor the wish, to compel Judges to believe witnesses examined before them. If, in this instance, the Judge knew of his own knowledge that the witnesses were not telling the truth, he could not believe them; and the case stood before him as if, no evidence being adduced, he had allowed the usual compensation in such cases; an allowance which he can always make, with the consent of the curator."

This was obviously a very different case from the present; and the important qualification, that it may be done with the consent of the party interested, seems to have escaped the notice of the counsel. We know of no authority of a Judge to assume judicially, without evidence, that the average value of slaves of the description of the one drowned, is \$500. The Judge expressed his doubts whether he was authorized to assess the damages, without evidence of the value of the slave; but upon the the whole concluded, that as the damages claimed were more in the nature of a debt, and as no objection was made to the amount, he might take upon himself to allow one-half of that claimed. We regret, under the circumstances of this case, that we are compelled to notice this error of the court below, and to reverse the judgment.

We think the court also erred, in giving judgment, in solido, against the joint trespassers. As the law stood at that time, the defendants are only liable jointly, and not in solido.

It is, therefore, ordered and decreed, that the judgment of the Parish Court be reversed, and that the case be remanded for a new trial; the costs of the appeal to be borne by the appellee.

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CHARLES CAFFIN v. WILLIAM SCOTT.

A lessor may receind a lease where the building is used for a purpose not contemplated at the time of the contract, and such use is injurious to him.

Where an action for the rescission of a lease, in which defendant claims damages in reconvention, is tried after the lease has expired, though there can be no judgment of rescission, yet if defendant's demand in reconvention be overruled, and the evidence shows that plaintiff would have been entitled to a judgment of rescission had the trial taken place sooner, there must be judgment in his favor for the costs-

APPEAL from the Parish Court of New Orleans, Maurian, J. Labarre, for the plaintiff.

A. Hennen, for the appellant.

SIMON J. This action was instituted to obtain the rescission of a lease, on the ground that the property leased is used by the defendant for an object different from that for which it was intended, to wit: that instead of the defendant's using the lower story of the plaintiff's house as a store, he uses it as a kitchen, which causes great inconvenience to the lessees who occupy the upper stories, and who threaten to abandon the same. An injunction was obtained to prevent the further use of the property in the manner complained of.

The defendant pleaded divers matters, to show his right of using the property as a kitchen and boarding house; complained of being disturbed in his enjoyment of the rented premises; and reconvened, by claiming judgment against the plaintiff for \$1000 damages.

This suit was brought about six months after the lease had commenced, which, as alleged in the petition, was to last one year, at the rate of \$80 per month; but was tried after the expiration of said lease. The plaintiff's cause of action had therefore ceased to exist at the time of the trial; and had it not been for the reconventional demand, the proper course, perhaps, would have been, to dismiss the suit.

But it was found necessary to try the suit, not only to ascertain upon whom the costs were to be thrown, but also to give effect to the defendant's reconventional plea, which he does not appear to have abandoned. The court below rendered a judgment for costs against the defendant, and he has appealed.

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We have carefully examined the evidence adduced by both parties on the trial of the cause, and concur with the judge a quo in the opinion, that the defendant's reconventional claim is not supported by any evidence, and that the same must be dismissed. Furthermore, the evidence establishes clearly, that the plaintiff's right of action was well founded; that the store rented to the defendant never was intended by the plaintiff to be used as a kitchen; that no such use was in contemplation at the time the lease was contracted; that this use is injurious to the plaintiff, and inconvenient and disagreeable to his other tenants; and that, therefore, the plaintiff would have obtained the rescission of the lease, if the trial had taken place sooner. The injunction was necessary to protect the plaintiff's rights and property; and we have not been able to discover any reason why the defendant should not pay all the costs occasioned by his illegal acts, and by his unfounded reconventional demand.

Judgment affirmed.

BACON TAIT v. JOHN L. LEWIS, Testamentary Executor of Henry De Ende.

A judgment pronounced in another State by a court of competent jurisdiction, against an administrator appointed to represent a defendant, who died pendents lite, and after answering, ascertaining the balance due by the deceased on the settlement of a partnership, in the absence of any proof that such judgment is not as valid by the laws of the State in which it was pronounced as if rendered against the heirs themselves, is prima facie evidence against the succession in this State, and sufficient to support a judgment by default. Const. U. S. art. 4, s. 1. C. P. 122. Per Curiam: We are not prepared to say, that it is conclusive against the heirs or executor here.

APPEAL from the Court of Probates of New Orleans, Bermudez, J.

G. Strawbridge, for the appellant.

Preston, for the defendant, cited Code of Pract. arts. 120, 747, 924. 8 La. 294. 3 Tucker's Blackstone, 302.

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Bullard, J. This case was before us in April, 1841, and the leading facts are stated in the report. See 18 La. 33. ment of nonsuit rendered by the Court of Probates was then affirmed, on the ground that only a part of the record in the case of Tait v. Wilkinson and De Ende, in the Superior Court of Law and Chancery of Virginia, was offered in evidence in support of the plaintiff's action, instead of a complete exemplification of The action was renewed in the Court of Probates, a judgment by default taken against the executor of De Ende, for want of an answer, and in confirmation of the judgment by default, a complete record of the case from the Virginia court was read; but the court being of opinion, that the judgment thus pronounced by the court in Virginia, against an administrator appointed there to represent the deceased De Ende, who died pendente lite, and after having filed an answer, has not the force of the thing adjudged against his executor in Louisiana, nonsuited the plaintiff, and he has again appealed. The case, therefore, presents the question, whether a judgment pronounced in a sister State by a court of competent jurisdiction, under such circumstances, is to be regarded here as conclusive, or even prima facie evidence of a debt due by the defendant's testator. It is proper to remark here, that Tait had sued Wilkinson and De Ende, for a final settlement of a partnership which had existed between the The case was at issue in the lifetime of De Ende, who having died before final judgment was pronounced, an administrator was appointed according to the practice in that State, and upon a scire facias against him, the suit was ordered to be revived, and "to be in all things in the same plight and condition it was at the time of the decease of the said H. De Ende." The final decree pronounced by the Court of Chancery, so far as it concerns the estate of De Ende, was, "that the defendant, Charles Warnack, Sheriff of the county of Cumberland, and as such administrator of Henry De Ende, deceased, do, out of the estate of his intestate in his hands to be administered, if so much he hath. pay to the plaintiff the sum of \$3761 85, the balance reported by the commissioners to be due to him, with interest thereon to be computed at the rate of six per centum, per annum, from the 31st day of March, 1831, and until paid."

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The constitution of the United States requires us to give here to a judgment rendered in another State, the same faith and credit to which it is entitled in the State where it was rendered.

The record does not inform us what would be the effect of this judgment in Virginia, according to the law of that State, either in relation to the heirs of De Ende, or to an executor who may have succeeded the administrator, against whom the judgment was originally pronounced, in the administration of the estate. As a general rule, we are not disposed to contest the principle assumed by the counsel for the appellee, and which appears supported by the authority of Story on the Conflict of Laws, that a judgment rendered against an administrator of an estate in one State, is not conclusive against an administrator in another. It is understood, that such suits merely against an administrator, bind only the property in his hands to be administered, and that he may plead plene administravit, and that such a plea, sustained by evidence, will be a bar to the action. But it appears to us. that the action in Virginia, in which this decree was finally pronounced, was something more. It was not a suit against an administrator, but against De Ende himself, who had appeared and filed an answer. Upon his death it was revived against his administrator, in the same plight and condition it was in at the time of his decease. The court then proceeded upon the issue already made up, to adjudicate upon the state of accounts between the original parties. It is very questionable whether the administrator thus brought in by scire facias, could have pleaded plene administravit. Be this as it may, the decree of the Court of Chancery purports to establish a balance due by the estate of De Ende. It confirms the report of commissioners to whom opposition had been made by the administrator. The court say: "On the whole, the court is of opinion, that the report does not exhibit larger balances due from the estate of De Ende to Tait and Wilkinson, than are really due to them respectively." It is true, the decree orders the administrator to pay that balance out of the funds in his hands, to be administered; thereby indicating, as we understand it, that the administrator is not made personally liable. According to the argument of the counsel, this decree by the Court of Chancery in Virginia would be without effect, not even liqui-

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dating the balance due by the estate. A judgment pronounced against an administrator is necessarily based upon the indebtedness of the intestate; and so far as such a judgment has been satisfied out of assets in the hands of the administrator, ought at least, to be *prima facie* evidence against an heir, who may afterwards claim the succession.

The jurisdiction of the Court of Chancery being admitted, we must presume it acted within its jurisdiction, in proceeding to final judgment against the estate represented by the administrator.

In the case of *Poole* v. *Brooks*, 10 La. 17, we held, that the judgment of a Court of Probates in Mississippi, acting within its jurisdiction, which established a balance in favor of the guardian of a minor, and ordered his successor to pay it out of the property of the minor, was *prima facie* evidence of a debt due by the minor to his former guardian, who brought suit against him in this State, and gave in evidence the record from the court of Mississippi. See *Gleason* v. *Dodd*, 4 Metcalf, 333.

But the counsel for the appellee places great reliance upon the 924th article of the Code of Practice, which gives to the Courts of Probates exclusive power to decide upon money claims against estates administered by curators, executors, or administrators. That principle is not questioned, and in this case, the suit is brought in the proper tribunal, and the question is not one of jurisdiction, but of evidence, to wit, whether the judgment rendered by the Court of Chancery in Virginia furnishes either conclusive, or prima facie evidence, that De Ende, at the time of his decease, was indebted to the plaintiff, as he alleges in his petition.

Article 122 of the Code of Practice, upon which the counsel for the appellant relies, establishes the principle, that judgments rendered against curators of vacant estates, are as valid and efficacious as if they had been rendered against the heirs themselves; and the next article extends the principle to executors, where none of the heirs are present or represented in the State. We are not informed by the record whether the same principle prevails substantially in Virginia, and we may presume, in the absence of proof to the contrary, that it does; but we see nothing in the record to justify us in concluding, that by the laws of that State a decree of the Court of Chancery, establishing a balance

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of accounts between parties regularly before it, is a mere nullity, except as relates to the administrator in that State, in whose name the suit proceeded to final judgment after the death of his intestate. We are not prepared to say, that it is conclusive against the heirs or executor here; but we have come to the conclusion, although the question is not free from difficulties, that, at least,

must be regarded as *prima facie* evidence against the succession. The defendant not having offered to go behind that judgment, but relying upon the issue implied by the judgment by default, the plaintiff is entitled to recover the amount of the original judgment.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be reversed; and ours is, that the judgment by default therein taken be confirmed, and that the plaintiff be recognized as a creditor of the estate of Henry De Ende for the sum of three thousand seven hundred and sixty-one dollars and eighty-five cents, with interest at six per cent from the 31st of March, 1831, to be paid in due course of administration, together with the costs in both courts.

THE STATE, for the use of the Charity Hospital of New Orleans, v. Samuel W. Fullerton.

The statute of 27 March, 1843, providing a fund for the support of the Charity Hospital of New Orleans, directs the masters of vessels and steamboats arriving at the city of New Orleans to collect, and pay to the collector appointed by the Charity Hospital, the tax imposed by that act on every passenger on the vessel or steamboat under his command, and authorizes the masters of such vessel or steamboat, in case any passenger shall refuse to pay said tax, to detain and sell a sufficient proportion of his or her baggage for the payment thereof. The statute imposes no penalty on the master of any such vessel or steamboat for refusing to collect or pay over such tax. In an action against the master of a steamboat to recover the amount of the tax imposed on passengers arriving on his boat during a certain period, which he had refused to collect: Held, that the tax being imposed exclusively on passengers, and not on the captain, officers or crew of the vessel whose labor is necessary for navigating it, and who may be regarded as among the instruments of commerce, cannot be regarded as a regulation of commerce; that the enactments of this statute cannot be said to be an usurpation of the

power to "regulate commerce with foreign nations and among the several States" exclusively vested in Congress by the constitution of the United States, (art. 1, § 8); that its provisions are not inconsistent with any law of Congress regulating commerce; nor is the imposition of such a tax prohibited by the first section of the act of Congress of 8 April, 1812, which provides as a condition upon which the State may be admitted into the Union, that the navigable waters leading into the Gulf of Mexico shall be common highways and forever free to all the inhabitants of the Union, without any tax, duty, toll or impost therefor, imposed by the said State, that act having no further application since the admission of Louisiana into the Union; but that the statute, not having imposed any penalty on the master for refusing to collect the tax, the court cannot supply the omission, and condemn him to pay the tax as a penalty for not having complied with the statute by collecting it from his passengers.

APPEAL from the District Court of the First District, Buchanan, J. This was an action against the master of a steamboat running between Mobile and New Orleans, to recover from him individually \$322 50, the amount of the tax levied by the act of 27 March, 1843, providing a fund for the support of the Charity Hospital of New Orleans, on passengers who had arrived on his boat at New Orleans, between the 9th April and 10th of May, 1843. The petition alleges, that the defendant had refused to collect and pay over the said tax; wherefore it prays, that he may be condemned to pay the same, &c.

The defendant answered, that the act of the Legislature of Louisiana imposing the tax is a violation of the constitution and laws of the United States, and that he is not bound to comply with its requirements. He denied generally the allegations of the petition, but admitted that he was the master of a steamer, a licensed coasting vessel of the United States, employed in trading and carrying passengers for hire between New Orleans and the States of Mississippi and Alabama.

The facts stated in the petition were admitted, on the trial, to be correct, the legal liability of the defendant being alone disputed. There was a judgment below for the plaintiff, from which the defendant appealed.

H. H. Strawbridge, for the plaintiff, contended, that the law was not inconsistent with the constitution nor laws of the United States. Amendments to Const. U. S. art. 12. 1 Wheaton, 304. 3 Wash. C. C. Rep. 313. Commonwealth v. Breed, 4 Pick. 460. 15 Wendell, 113. 2 Peters, 251. Gibbons v. Ogden, 9 Whea-

ton, 215. North River Steamboat Navigation Company v. Livingston, 3 and 6 Cowen. Acts of Congress of 7 Aug. 1789, 27 May, 1796, and 5 Feb. 1799.

Preston, Attorney General, on the same side.

Eustis, for the appellant. The law of 1843, on which this action is based, is unconstitutional, being contrary to art. 1, sect. 8. of the Constitution of the United States, by which the power is given to Congress, "to regulate commerce with foreign nations and among the several States and with the Indian tribes." Story on the Constitution, § 1067, 1068, p. 515, et seq. 9 Wheaton, 197-204, 209. 12 Wheaton, 419, 445, 447. 1 Kent's Comm. Lect. 19, p. 404. Federalist, letter xlii, p. 227. The power to regulate is an exclusive power. It implies full, absolute and sole control over the thing to be regulated. This position was fully argued by learned counsel in the case of Gibbons v. Ogden, 9 Wheaton, loco citato. The court say there is great force in the argument, and that they were not satisfied that it was refuted. Judge Story adopts it as the settled jurisprudence of the constitution. Loco citato.

The basis of commerce is intercourse. A power to hamper by legislation the intercourse between the States is tantamount to a power to control their commerce, and clearly conflicts with the power of regulating commerce which the constitution vests in the Congress of the Union. In the case of Brown v. The State of Maryland, 12 Wheaton, 446, the Chief Justice said: "What then is the just extent of a power to regulate commerce with foreign nations, and among the several States? This question was considered in the case of Gibbons v. Ogden, in which it was declared to be complete in itself, and to acknowledge no limit other than one prescribed by the constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior." It is believed that this act is without example in the legislation of the States. What would be thought of a tax like this on passengers entering the cities of New York and Philadelphia from the adjacent States? The whole history of the government condemns it. A similar law was vetoed by Governor

White of this State during his administration, on the ground of its unconstitutionality.

The act is contrary to the acts of Congress for the admission of Louisiana into the Union, (see acts of Feb. 16th, 1811, and 8th April, 1812. Ingersoll's Dig. 587, 588,) which provide for the freedom of the Mississippi and the waters leading into it and the Gulf of Mexico. The freedom of the navigation of the Mississippi was stipulated in the treaty of Paris in 1763, and was always insisted on by our government in our relations with Spain. These acts of Congress are exponents of what would be other wise the settled law of the land.

Bullard, J. This is an action instituted by the Attorney General, in the name of the State, for the use of the Charity Hospital, against the captain of a steamboat plying between Mobile and New Orleans, to recover from him the amount of the tax levied on passengers from other States by the act of 1843, entitled "An act to amend an act to provide a fund for the support of the Charity Hospital," &c. The ground upon which the recovery is sought is, that the defendant had refused to collect and pay over the taxes upon a large number of passengers who had arrived, at different times, on board his boat.

The second section of the statute declares, "that masters of v s-sels and steamboats arriving at the city of New Orleans shall collect, and pay to the collector appointed by the Charity Hospital, the tax on each and every passenger on board the vessel o steamboat under his command," &c.; "and any passenger refusing to pay said tax, the master of said vessel or steamboat may detain, and sell a sufficient proportion of his, her or their baggage for the payment of the same." Another section authorizes the collector of the Hospital to demand the register or record of passengers, and imposes a penalty on the captain of fifty dollars in case of his refusal. But the statute imposes no penalty on him in case of his refusal to collect the tax from his passengers, as authorized by the second section.

The defendant, in his answer, admitting that he is the commander of a boat for the transportation of merchandize and passengers, avers that the statute of the State of Louisiana recited in the petition, is null, void and of no effect, because it is repugnant

to the constitution and laws of the United States, and that, by reason thereof, he is not bound to collect, receive, or pay over said tax. He further avers, that his steamer, called the Fashion, is a coasting vessel, carrying merchandize and passengers for hire, between Port Pontchartrain and the States of Alabama and Mississippi, under a license from the United States.

The defendant has thus chosen to rest his defence mainly upon the unconstitutionality of the State law imposing a tax upon persons arriving from abroad, and the judgment of the District Court being against him on that point, he prosecutes the present appeal.

The counsel for the appellant contends: 1st, That the act in question is repugnant to that part of the federal constitution which confers on Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." Art. 1, sec. 8. And secondly, that it is contrary to the acts of Congress providing for the admission of Louisiana into the Uuion, and for the free and unrestrained navigation of its waters.

I. Before examining the authorities upon which the counsel relies in support of his proposition, it may not be amiss to remark, that the tax in question is not levied exclusively on citizens of other States or foreigners arriving in New Orleans. A citizen of this State on his return, after a temporary absence, is equally liable to it, whatever may have been the motive of his absence, whether business or recreation. It is also not to be overlooked, that the tax is not payable by the captain, officers, or crew of the vessel or steamboat. Those persons, whose labor is required in navigating the vessel, and who may be regarded as it were, as among the instruments of commerce, are exempted from the tax. It is levied exclusively on passengers, on their arrival in the city of New Orleans. It is, therefore, a tax neither upon the cargo, nor the vessel, nor on those engaged in navigating it. It does not obstruct or burden the commerce of the country, and it cannot be regarded as a regulation of commerce, either with foreign countries, or with the other States. In the enactment of the statute imposing this tax, the Legislature cannot be said, therefore, to have usurped any of the powers exclusively vested in Congress.

to regulate commerce among the States or with foreign nations. Is it repugnant to, or inconsistent with, any law enacted by Congress, regulating the commerce of the United States?

The case of Gibbons v. Ogden turned upon the question, whether a statute of New York granting to certain persons the exclusive privilege of navigating the waters of that State with vessels propelled by steam, was repugnant to the acts of Congress regulating the coasting trade between the States. It was decided, that the power to regulate commerce extends to the regulation of navigation; that it is exclusively vested in Congress, and embraces every species of commercial intercourse between the States and with foreign powers; and that the laws of New York grant ing the exclusive privilege, were in collision with those acts of Congress which regulate the commerce between the States, or the coasting trade. That celebrated controversy commenced by an injunction issued by the Chancellor of New York, restraining Gibbons from navigating with his steamboats between New Jersey and New York, notwithstanding the enrollment and license of his boats as coasting vessels. The State court sustained the grant to Livingston and Fulton, and the question was taken before the Supreme Court of the United States, by writ of error In that case it is obvious, that the right conferred by the act of Congress on licensed vessels, to carry on commerce between the ports of one State and those of another, was impeded and impaired by the State law, which established essentially a regulation of commerce, inconsistent with that which Congress had thought proper to enact. The decision does not, therefore, bear directly upon the case now before the conrt, which seems to involve rather a question of State taxation, than one which concerns the regulation of commerce. The distinction between the two classes of cases is obvious. The power to regulate commerce between the States and foreign nations, is exclusively vested in Congress. The power of taxation resides in the States to an unlimited extent, except so far as restrained by the Federal or State constitu-This very difference creates the essential difficulty of cases like the present. If a State tax be inconsistent with any regulation of commerce by the sovereign authority of the Union, by imposing burdens, or restrictions, or conditions, unknown to

the law of Congress, the act creating such a tax must be regarded as unconstitutional and void. The States are forbidden by the constitution to lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. In the case of *Brown* v. The State of Maryland, the Supreme Court of the United States held, that an act of the Legislature of that State was unconstitutional and void, which forbade the selling of any packages of imported goods until the importer should have obtained a license, for which fifty dollars was to be paid to the State.

The Chief Justice in delivering the opinion of the court, remarks, that "any penalty inflicted on the importer, for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means of accomplishing that introduction and incorporation. The distinction between a tax on the thing imported and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce." 12 Wheaton, 419.

The court, in the same case, admit the power of the States to tax their own citizens or their property within their territories; but they say, they cannot admit that it may be so used as to obstruct the free course of a power given to Congress. "The taxing power of the States must have some limits. It cannot feach and restrain the action of national government, within its proper sphere. It cannot reach the administration of justice in the courts of the Union, nor the collection of taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass." Loco citato.

A further illustration of this principle may be found in the case of Weston et al. v. The City Council of Charleston, 2 Peters, 449, in which it was settled, that a State tax upon stock issued for loans made to the United States is unconstitutional.

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The authority of the States to tax persons and things for revenue, rather than as a means of regulating commerce, for sanitary purposes, and with a view to ascertain the quality of different products before their exportation by inspection, has never been questioned. To use the language of the court in the case of Gibbons v. Ogden, in speaking of such laws: "They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass."

The concurrent power of taxation residing in the Union and in the States, is liable to lead to a collision, and it is certainly difficult to draw the line which separates these powers. It was justly remarked by Mr. Justice Johnson, in delivering his separate opinion in the case above mentioned: "That the line cannot be drawn with sufficient distinctness between the municipal powers of the one, and the commercial powers of the one. In some points they meet and blend so as scarcely to admit of a separation. Witness the laws of Congress requiring its officers to respect the inspection laws of the States, and to aid in enforcing the health laws; that which surrenders to the States the superintendence of pilotage; and the many laws passed to permit a tonnage duty to be levied for the use of their ports."

It cannot be expected of us to lay down a general rule by which to test, in all cases, the constitutionality of a State tax. The one which we are now considering was imposed for the support of a great public charity, which the people of all the States whose citizens trade with, or visit this great commercial emporium, have an interest in supporting. It falls indiscriminately upon the citizens of Louisiana and other States, and foreigners who arrive in New Orleans, either by sea or our rivers and lakes. Those who land above or below the city are exempt from the tax. It is not levied either upon the crew of the vessel or the cargo. It offers no impediment to the free navigation of our waters, nor to the entry of the vessel, or the disposition of the cargo, according Vol. VII.

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to the laws of Congress. It affects not the commercial classes alone, nor those who visit the city upon mercantile pursuits, but all without distinction. No adjudicated case has been brought to our notice, nor are we acquainted with any analogous to the present. We are not prepared to say that the tax in question is in collision with any regulation of commerce established by Congress, or that it interferes with the action of Congress in the exercise of its delegated powers.

II. The argument drawn from the provisions of those acts of Congress which provided for the free navigation of the waters of Louisiana, as a condition upon which that territory was admitted into the Union as a State, is not conclusive. Those laws, since Louisiana has become a part of the Union, like the treaty of cession, having done their office, have no longer any application. They were in the nature of a compact, and since that period the free navigation of our rivers and lakes, like that of the Chesapeake Bay or the North River, depends not so much upon those acts of Congress, as on the general principles of the federal compact to which this State has subscribed. We see nothing in the act imposing the tax in question, which restrains that freedom, or renders the navigation of our waters more onerous.

The high court, whose decisions we are in the habit of regarding as truly expounding the constitution, in the case of the *Providence Bank* v. *Billings et al.*, recognized the power of State taxation as co-extensive with its territory, and laid down the principle that the surrender or abandonment of such right could not be presumed; that it resides in government as a part of itself, and need not be reserved, where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies; that the power may be abused, but the constitution of the United States was not intended to furnish a corrective for every abuse of power, which may be committed by the State governments. 4 Peters, 544.

Upon the whole, although we are not satisfied that the statute imposing the tax in question is unconstitutional, yet the defendant denies generally his liability to pay the tax levied upon his passengers; and this part of his defence requires an examination of the grounds on which the State bases its right to recover of him.

The act makes it the duty of the captain to collect the tax, and affords him the means of coercion; but it imposes no penalty in case of his neglect or refusal to collect. If it did, we should be inclined to doubt whether it would not amount to such a restriction or burden upon the navigation of our waters, by passenger boats, as would be in collision with the laws of Congress. the act, in our opinion, creates an office, and the captain is made a State officer, for the purpose of collecting. He is not, in our opinion, obliged to accept the office and perform its duties." If he had voluntarily undertaken to collect, and had, in fact, received any part of the tax, an action would lie to compel him to pay over, but this is not alleged. He is sought to be made liable for neglecting to perform a duty imposed by the statute; and the obligation to pay the tax himself, is not denounced as the penalty for his refusal. The courts cannot supply that penalty, and condemn the captain to pay the tax assessed upon his passengers, for not having done what, in our opinion, he was not legally bound to do. The only duty which the statute imposes upon the captain, under a penalty, is that of exhibiting his manifest, or list of passengers, to the collector of the Charity Hospital.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed; and that ours be for the defendant, with costs in both courts.

SAME CASE.—ON A RE-HEARING.

On a question as to the constitutional authority of Congress, and the consequent restriction upon the power of State Legislatures, a decision of the Supreme Court of the United States must be regarded as settling the law.

H. H. Strawbridge, for the plaintiff, contended, that the law of 1843 was not a violation of the constitution of the United States. Similar laws have been passed in other States, and their constitutionality has been sustained. See a statute of the State of New York, enacted for the support of its Marine Hospital. 1 Rev. Statutes, p. 48, and vol. 3, p. 274, ed. of 1837. Also a law

of the same State, (1 Rev. Stat., vol. 1, p. 637, s. 69,) relative to This last law was declared constitutional by the Supreme Court of that State, in the case of New York v. Staples, 6 Cowen, 169, and by the Supreme Court of the United States in Candler et al. v. The Mayor, &c. of New York. See 1 Wendell. 493. See also the case of Norris v. The City of Boston. 4 Metcalf, 282, in which an act of the Legislature of Massachusetts, subject ingshipmasters to a tax on every passenger for the purpose of providing a pauper fund, was declared to be constitutional; and see the law of the same State, passed in 1830, on the same subject. 1 Metcalf & Perkins' Rev. Statutes, p. 373. case of The Mayor, &c of New York v. Miln, 11 Peters, 102, in which the Supreme Court of the United States affirmed the constitutionality of the New York statute of 1824, requiring in certain cases indemnity bonds from masters of vessels bringing passengers into the city of New York, is still more in point. the act of the Legislature of Delaware of 12th February, 1829, s. 15, similar to the New York law of 1824, and a law of this State on the same subject, passed in 1818, and the law of 1821 on the subject of quarantine.

Eustis, for the appellant. The question whether the law under consideration is contrary to that provision of the constitution which vests in Congress the power to regulate commerce among the several States, is almost one of fact. The court see nothing in it which restrains the freedom of navigation, or renders the navigation of our rivers more onerous. Is not a tax onerous? Is navigation free when it is taxed? Do not duties on goods render their importations operous? Do not duties restrain importations, and are goods that pay duties in any sense free? The mail which transports letters and packages is not free, in any sense, except for those which are franked, or on which no postage is charged. A road for which toll is exacted is not free. An imposition on persons engaged in commerce going from place to place, is as much a regulation of commerce in point of fact, as a duty on merchandize. If persons are taxed on their arrival, how can it be said that their ingress is free, or that the intercourse is not restrained.

It is contended, that this tax does not interfere with the power to regulate commerce. Did the occlusion of China affect its com-

merce? The exclusion of strangers from its limits rendered that nation anti-commercial; and it may be asked, what nation ever imposed a tax on intercourse between different portions of its territory?

"The right of carrying passengers is given by the coasting license. It gives permission to trade, which includes the right of transporting passengers for hire. If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct, and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted, which is not proved by the words or the A coasting vessel employed in the nature of the thing. transportation of passengers, is as much a portion of the American marine, as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government which has been thought best fitted for the purpose generally." Ch. J. Marshall, Gibbons v. Ogden, 9 Wheaton, 215. The strongest argument against the legality of this tax is, the uniform concurrent legislation of the different States up to the present time. The conviction of its unconstitutionality must have been abiding and universal in the United States.

But States have exercised a supervision and power of taxation over foreign passengers, and such laws have been held to be constitutional; though we find no decision in which the right of the State to tax the passenger directly, is admitted—the captains, owners, &c., are taxed by the State, but not the passengers. The ground on which these decisions rest is, the power which every State has to regulate its own police, which includes a control over paupers, and the public health, which it may protect by quarantine and health laws of every description. This power is founded on necessity, and is inherent in every community. The assumption that the present tax is authorized by this power, in the absence of the necessity, is inadmissible. In no

case has the right to tax passengers coming from other States in licensed coasting vessels of the United States, ever been, even by implication, countenanced.

The reasoning in the decision in Miln's case, (11 Peters, 105,) does not apply to our internal commerce. Merchants carry on their trade themselves in different parts of the Union. The merchant of Boston, of New York, of St. Louis and Cincinnati transacts his business in New Orleans. The New York merchant lives in New Jersey; the merchant of Philadelphia resides there or perhaps in Delaware. The Cincinnatian has his house in Kentucky, and he of Illinois, perhaps in St. Louis. To tax these merchants every time they cross the river to go to their counting-houses, would seem to interfere with commerce and infringe a little on the freedom of intercourse.

The case of Morris v. The City of Boston, (4 Metcalf, 283,) arose under the pauper laws of Massachusetts. The tax was on the master, owner, consignee or agent. The vessel was a foreign one, and from a foreign port. This case offers a complete answer to the argument of the counsel for the plaintiff. was on the master, &c., but in answer to objections which would have affected its constitutionality, the court assert in the most formal manner, that the decision rests on the inalienable neces-"We think," say they, "it is plain, that if any sary pauper right. such large sum were exacted of passengers, it would indicate the real purpose and design of the law to be to raise revenue, and not in good faith to carry into effect a useful and beneficent poor law: useful and beneficent to such aliens themselves; therefore, that it would be in contravention of the constitution and laws of the United States, and void. But to apply this principle to the construction of an act of State legislation, it must be apparent to the court, that the real purpose was distinct from the ostensible one."

"The constitution of the United States gives the principle which must govern all such cases. The law of the Union first has its full operation; and so much only of the State law, as is not abrogated by the effect of the supreme law, remains. This principle destroys all incongruities, and is the only legitimate test of which such cases are susceptible. The right given by a law of the Union to navigate from State to State, cannot be

abridged or restricted by a State law; and whenever a case of navigation between this State and another takes place, the State grant is extinct, as an impediment or objection to such a voyage. 3 Cowen, 716, 719.

There is no penalty for the non-collection of this tax. The tax does not purport to be imposed under the poor law or sanitary power. It is to support a hospital which had been supported for years from State resources, and from funds which still may be made available. No necessity exists, or is pretended to exist for it. It is a mere experiment upon the travelling public, and upon the constitution. Judge Story, in 1837, looked forward with alarm to this state of things, and in his memorable dissenting opinion in the case of The City of New York v. Miln, in which he had the concurrence of the late Chief Justice Marshall, said: "If this act be constitutional to this extent, it will justify the States in regulating, controlling, and in effect, interdicting the transportation of passengers from one State to another in steamboats and packets. They may levy a tax upon all such passengers; they may require bonds from the master, that no such passengers shall become chargeable to the State; they may require such passengers to give bonds that they shall not become so chargeable; they may authorize the immediate removal of such passengers back to the place from which they came. would be most burthensome and inconvenient regulations respecting passengers, and would entirely defeat the object of Congress in licensing the trade or business. And vet, if the argument which we have heard be well founded, it is a power strictly within the authority of the States, and may be exerted at the pleasure of all or any of them, to the ruin and perhaps annihilation of our passenger navigation. It is no answer to the objection to say, that the States will have too much wisdom and prudence to exercise the authority to so great an extent. Laws were actually passed of a retaliatory nature, by the States of New York, New Jersey and Connecticut, during the steamboat controversy, which threatened the safety and security of the Union; and demonstrated the necessity, that the power to regulate commerce among the States should be exclusive in the Union, in order to prevent the most injurious restraints upon it.

"Such is a brief view of the grounds upon which my judgment is, that the act of New York is unconstitutional and void. In this opinion, I have the consolation to know, that I had the entire concurrence, upon the same grounds, of that same great constitutional jurist, the late Mr. Chief Justice Marshall. Having heard the former arguments, his deliberate opinion was, that the act of New York was unconstitutional; and that the present case fell directly within the principles established in the case of Gibbons v. Ogden, 9 Wheat. 1, and Brown v. The State of Maryland, 12 Wheat. 419." 11 Peters, 159.

It is obvious, that if the right to tax passengers coming from another State of this Union on the business of commerce, in a licensed coasting vessel, be vested in a State, which is most strenuously denied, yet the forced collection of this tax on board the vessel, on the part of the captain, which this law purports to impose as a duty, is a direct and palpable interference with the paramount right of regulating commerce which is vested in Congress alone, and therefore void and of no effect.

BULLARD, J. A re-hearing was given in this case, and it has been again elaborately argued in writing. We have kept it under advisement for a considerable length of time, and maturely considered the authorities relied on.

Before announcing the result of our re-examination of the subject, it is proper to state precisely what our first decision was, as it seems to have been misunderstood. It will be seen then, on recurring to the opinion first pronounced, that we held: First, That the act of the Legislature imposing a tax upon passengers arriving in New Orleans from beyond the limits of this State, for the support of the Charity Hospital, is not, in the opinion of this court, repugnant to the constitution and laws of the United Secondly, That although the captain of the vessel is authorized to collect the tax, and is clothed with power to coerce its payment, and to that extent may be considered as a State officer, yet as the Legislature has imposed no penalty in case of his neglecting or refusing to make the collection, and that part of the statute is without a sanction, the courts cannot supply such penalty. It was upon this last ground alone, that under the plea of the general denial, we held, that the master is not liable to pay

the tax, as a penalty for not having complied with the requirements of the statute, by collecting it from his passengers.

The counsel for the plaintiff has called our attention to the laws of New York and Massachusetts of an analogous character, to the decisions of the Supreme Court of the United States in the case of *The City of New York* v. *Miln*, (11 Peters, 102,) and of the Supreme Court of Massachusetts in the case of *Norris* v. *The City of Boston*, affirming the constitutionality of those laws.

The statute of New York, out of which arose the first of these cases, authorized the Health Commissioner to demand, and, in case of refusal or neglect to pay, to sue for and recover, from the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar; and from the master of each coasting vessel, for each person on board, twenty-five cents, with certain restrictions as to coasting vessels from the adjoining States. See 1 Revised Statutes, 436, 437. Another section of the same law required every master of a coasting vessel to pay to the Health Commissioner, at his office in the city of New York, within twenty-four hours after his arrival, such hospital moneys as might be due by him under the law; and "every master for each omission of such duty, shall forfeit the sum of one hundred dollars."

The Massachusetts statute provided, among other things, that no alien passengers should be permitted to land, until the master, owner, or consignee shall pay to the boarding officer, two dollars for each passenger so landing. Norris, the plaintiff, having paid the tax for nineteen passengers, who had arrived on board of his vessel, which sum went into the treasury of the city of Boston in pursuance of the statute, sued the city to recover it back, on the ground, that the statute was repugnant to the constitution and laws of the United States. Both these decisions affirm the constitutional validity of those enactments, even where the tax is imposed upon the master, owner, or consignee. But they do not touch the only question, upon which the case now before us turned, to wit, whether the master, who is not taxed, be legally bound to make the collection, under the penalty of paying the tax himself. The statutes of those two States are totally different from Vol. VII.

In New York and Massachusetts, the master, owner, or consignee is the tax payer, and the tax varies with the number of passengers or persons on board. In Louisiana it is the passengers alone who are taxed, and the master is made the collec-In performing that duty under the statute, the master would become either the gratuitous mandatary of the Charity Hospital, (which could not be without his consent,) or a State officer, pro Admitting that the State may impose duties upon any class of its citizens, as contended by the plaintiff's counsel, and even upon foreign captains of merchant vessels the moment they arrive in this port, the difficulty is in coercing their obedience, where the law has no sanction, and disobedience is threatened with no definite punishment or penalty. If disobedience in such cases were even declared to be a crime, the courts cannot declare what shall be the punishment. The numerous class of cases to which the plaintiff's counsel refers us, will be found in most instances, to consist of duties imposed either under penalties declared by law, or services to be rendered. ex officio, or in consequence of holding some office. In neither case is there any difficulty. The penalty may be recovered, or the officer held to account for his neglect of duty, because the exercise of the office implies his consent to perform such ex officio duties. Such is the case with clerks and sheriffs in relation to the collection of taxes on suits, and of executors as to the collection, or rather the retaining of the tax on legacies to foreigners, &c. But these officers may, at any time, resign; and thus relieve themselves. Even supposing that the neglect to perform duties required by this statute, although not punishable by a definite penalty, would give rise to an action in damages in favor of the person or institution for whose benefit they were required, yet it does not follow, that the damages would be necessarily equal to the tax on all the Some may be unable to pay; others may have no baggage upon which the captain could lay his hands, as the only means of coercion which the statute gives him. The damages could only be commensurate with the injury sustained by the neglect of the captain; and that injury must be shown by the party complaining. The passenger owes the tax, and it may be recovered of him by direct action, and is not necessarily lost, beSaulet v. Trepagnier and others.

cause the master of the vessel was either unable to collect it, or unwilling to embroil himself with his passengers, and render himself odious by resorting to a summary seizure of their bag-

In our first opinion, we expressed a doubt whether the statute would be constitutional, if it had been obligatory on the masters of vessels navigating under a license from the custom-house, to pay the tax in default of collecting it of his passengers. The Supreme Court of the United States was not unanimous upon that question, in the case of New York v. Miln. One very able and learned Judge dissented, and stated that he had authority to say that Chief Justice Marshall concurred in opinion with him. Under such circumstances we might well entertain some doubt; but upon a question of the constitutional authority of Congress, and the consequent restriction upon the power of the State Legislatures, we regard a solemn judgment of that high tribunal as settling the law.

The judgment first pronounced must remain undisturbed.

FRANÇOIS SAULET v. MARGUERITE TREPAGNIER and others.

The widow and heirs of a surety on an appeal bond cannot be proceeded against in the same manner as the surety himself may be, under the 20th sect. of the act of 20 March, 1839, amending art. 596 of the Code of Practice. In authorizing the summary remedy provided by that act, the legislature contemplated no other proceedings than those against the surety himself.

APPEAL from the District Court of the First District, Buchanan, J.

Buisson and Roselius, for the plaintiff.

Josephs and Preston, for the appellants.

MARTIN, J. The widow and heirs of François Trepagnier, surety of Pierre Trepagnier on appeal bond, are appellants from a judgment making absolute a rule which the present plaintiff, the obligee in the appeal bond, had obtained against them, on producing a writ of *fieri facias*, which he had obtained against the late Pierre Trepagnier, returned nulla bona, to show cause

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why execution should not issue against them, the said widow and heirs.

Their counsel has urged, that the rule was improperly issued. It was founded on the act of 1839, sec. 20, page 170, amending the Code of Practice, (art. 596,) and providing that, "if the judgment be affirmed, the plaintiff may, on the return of the execution that no property has been found, obtain a decree against the surety on the appeal bond for the amount of the judgment, on motion, after ten days' notice, which motion shall be tried summarily and without the intervention of a jury, unless said surety shall allege, under oath, that the signature to the bond purporting to be his is not genuine, or that the judgment has been satisfied."

In the present case the appeal was taken, and the bond executed, before the year 1839, when the condition of the appeal bond did not authorize a judgment against the surety, until it shall appear that the judgment affirmed cannot be satisfied by the proceeds of the appellant's property, real and personal.

The counsel has urged, that the summary remedy theretofore given by the Code of Practice, was confined to the surety himself and did not extend to his widow and heirs, and that that given by the act of 1839 can extend no further; that the Code of Practice protected the surety until it was manifest that the judgment affirmed could not be satisfied by the sale of the appellant's property, while the act of 1839 makes the surety liable "on the return of the execution that no property has been found," without allowing him to show that his principal has property in another parish than that to which the appellee has seen fit to direct the execution. The provision that, unless the surety shall swear "that the signature to the bond purporting to be his is not genuine, or that the judgment has been satisfied," judgment shall be given against him, evidently shows, that the Legislature contemplated no other proceedings than those against the surety himself; as his wife and heirs could seldom take the oath required by the act, and might often have a right to other means of defence which the surety could not urge. Lastly, the counsel has shown, that the court erred in giving judgment for a gross sum against the widow and heirs; that neither she nor they are

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in any manner jointly liable, she for one-half and each of the heirs severally, for their virile portion.

The counsel for the appellee has replied, that the Legislature have thought it best that, after all the means of procrastination which the law affords against the plaintiff have been exhausted by the decision of the last tribunal, he should be protected against a resort to a similar delay by the surety for the appeal or his representatives; and he contends, that this court may amend the judgment, by apportioning the amount of the judgment against the widow and heirs.

It appears to us, that the plaintiff mistock his amedy, and that the widow and heirs of the surety or an appeal bond cannot be proceeded against, in the same mannel as a surety could under the act of 1839, especially on an appeal bond are like a before the passage of that act.

It is, therefore, ordered and decreed, that the identification to be annulled and reversed, and that the rule to divide the plaintiff and appellee against the defendants and appellers, be discharged, without prejudice to his rights against them; and that he pay costs in both courts.

ABRAHAM McGehee v. Aubry Dupuy, Under-Tutor of the Minor Heirs of Abraham, and Mary C. McGehee, deceased.

A tutor cannot, by proceedings had contradictorily with the under-tutor during the minority of his pupil, make any settlement of his accounts, which will be conclusive upon the latter on attaining the age of majority. Nor does art. 301 of the Civil Code, which makes it the duty of the under-tutor to act for the minor whenever the interest of the latter is opposed to that of the tutor, give the under-tutor any authority to require the tutor to render his accounts.

APPEAL from the Court of Probates of Iberville, Dutton, J. W. B. Robertson and Muse, for the plaintiff. Edwards, for the appellant.

BULLARD, J. On the death of the plaintiff's wife he became tutor of their minor children, and caused an inventory to be taken which exhibits some tracts of land and personal property as be77 229 49 984 McGehee v. Dupuy, Under-Tutor.

longing to the community between him and his late wife, and a considerable property belonging to the plaintiff in his own right. It appears that the community property was adjudicated to him, at the appraised value. The wife had brought nothing into marriage, while the husband was rich.

In 1839, about one year after the death of the plaintiff's wife, and while his children were yet under the age of puberty, he instituted the present proceeding against them, represented by their under-tutor, with a view to the final settlement and liquidation of the community; and he prays for judgment for a balance due to him by his children. In his petition he sets forth the time and circumstances of his marriage with their mother, his own ample fortune and her poverty; their removal from Alabama to Louisiana in 1835; his purchase of a plantation, partly on credit; the payment out of his own means of \$8000, before the death of his wife, and, finally, that the entire price of \$20,000, was paid by him. He sets forth the purchase of another plantation, which has been paid for since the death of his wife.

The under-tutor filed an answer in which he denies the facts, and requires strict proof; and he claims as community property, the lands and effects stated to be so in the inventory. He alleges, that the plaintiff had cultivated the plantations, and enjoyed the revenues, of which one-half belongs to the minors; and he concludes by praying for a settlement, liquidation and partition of the community; and he prays for judgment for \$20,000, as due to the minor children.

In the month of February, 1841, the plaintiff presented another petition, in which he represents, that in obedience to an order of the Probate Court, he presents himself to render an account of his administration of the estate of his late wife; that he had previously, in 1839, caused a faithful inventory to be taken of all the property belonging to said succession; that, on his application, all the property held in common had been adjudicated to him, at the appraisement value; that he annexes his account, which contains a true and faithful account of his administration. He represents, that for the two first years after the purchase of the Manchac plantation, the expenses for carrying it on were very heavy. He

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prays for the homologation of the account, and for judgment for the balance in his favor, of \$1783.

This account was finally approved and homologated by the Court of Probates, thereby establishing a balance against the minors. The under-tutor has appealed.

It must be remarked, that the plaintiff had no other capacity in which to administer the estate of his deceased wife, than that of tutor of his own and her minor children. He was not an administrator, acting under appointment of the Court of Probates. The question then presents itself, whether a tutor, by any proceeding contradictorily with the under-tutor during the minority of his pupil, can make a valid settlement and rendition of accounts, so as to conclude him on his attaining the age of majority.

The same question presented itself to this court in the case of Stafford et ux. v. Villain et al. (10 La. 319,) in which it appeared, that an account had been rendered contradictorily with the under-tutor, which was opposed to the minor after she became of age as having the force of the thing adjudged. The court on that occasion said: "Tutors, under an order of the Court of Probates must, and without it may exhibit an account of their administration, and the court may make certain orders thereon; but nothing authorizes it to homologate such accounts, so as to render them conclusive and binding on the minor; for the law gives to the latter the right until the expiration of a certain delay after he comes of age, to examine and contest all the accounts of his tutor. The court, therefore, can in no case relieve and discharge the tutor from his responsibility, as has been done in this case."

In principle we cannot distinguish that case from the present. Indeed the right of the tutor to render such an account to the under-tutor, implies a correlative capacity on the part of the latter to coerce its rendition, as has, in truth, been attempted in this case, in the shape of a reconventional demand, and a prayer for judgment against the tutor for a certain balance. We are by no means disposed to admit, that art. 301 of the Civil Code, which makes it the duty of the under-tutor to act for the minor whenever the interest of the minor is opposed to that of the tutor, gives him any authority to require a rendition of accounts of the administration. Even admitting that the under-tutor has a right in such cases to

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exercise any action of the minor, it is obvious that the minor has no such action until the expiration of the tutorship.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be reversed, and that ours be for the defendant, with costs in both courts, without prejudice to any just claims which the plaintiff may have against his pupils, or to his title under the adjudication to him of the property of the community.

THE TESTAMENTARY EXECUTOR OF MANUEL ANDRY v. ALEXANDER FOURCHY.

An appeal will lie from a judgment making absolute a rule to show cause why certain property, purchased by defendant at a judicial sale, but not paid for according to the terms of the adjudication, should not be re-sold at his risk. The judgment, if executed, may work an irreparable injury, for the re-sale of the property might place it in other hands from which the reversal of the judgment below could not displace it.

RULE on the Judge of the District Court of the First District, to show cause why a *mandamus* should not be issued, directing him to allow an appeal from a judgment rendered by him.

Roselius, for the rule.

Buchanan, Judge of the District Court of the First District, showed cause against the rule.

Castera and Blache, on the same side.

MARTIN, J. The defendant prayed for an appeal from a judgment making absolute a rule which the plaintiffs had obtained against him, to show cause why the Sheriff should not proceed to the re-sale of a house and lot in the city of New Orleans, which had been adjudicated to him, and why said re-sale should not be made at his risk and peril.

The appeal being refused, he obtained a rule on the District Judge, to show cause why a *mandamus* should not be issued, directing him to allow a suspensive appeal.

The Judge showed for cause: "That this is a suit for a partition; that the plaintiff's testator was the owner of a certain lot of ground in this city, and the defendant owner of the buildings situ-

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ated on said lot; that for the purpose of effecting a partition, the same was offered for sale, with the consent of both parties, for cash; that the defendant was the last and highest bidder; that the property was adjudicated to him; that he neglected to pay the price of the adjudication; that, after seventeen days had intervened, the plaintiffs took a rule in the District Court upon the defendant, to comply with the adjudication aforesaid, or, in default thereof, to show cause why the property should not be resold, at his risk; that said rule was, after argument, made absolute; that the only effect of the appeal prayed for, would be to defeat the ends of justice; and that this court could not possibly render any other judgment than that rendered by the inferior court, to wit, a decree for the sale of the property."

Whatever intimate conviction our learned brother of the District Court may have, that the object of the appeal is only to defeat the ends of justice, and that this court could not possibly render any other judgment than that rendered by the inferior tribunal, the defendant's claim to our action upon that judgment, could only be resisted under the impression which we at first received, that it could not work any irreparable injury to him, and that he could have relief at our hands, after the sale, if he should be called upon to pay the difference between the two prices, if the last was less than the first; but more mature reflection has led us to the conclusion, that the consequences of refusing our attention to this claim now, may occasion an injury to him which he could never redress. The Judge places both parties before us as joint owners of a piece of property, to the indivision of which they sought to put an end by sale.

It was adjudicated to the defendant. The re-sale which the District Court has ordered may place it in other hands, from which the reversal of the judgment below could not displace it, and his title thereto, whatever it may be, would be irrevocably cancelled. It is difficult for us to see why the plaintiff resorted to a rule, and did not insist on the Sheriff's re-advertising and reselling. Had this been done, the defendant could not have successfully resisted the resale, for the purchaser could have acquired no title unless his conduct had authorized the re-sale; while, if it had been done under the authority of a judgment unappealed,

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but appealable from, the title of the purchaser would run no risk of being shaken, even on the reversal of the judgment which the defendant complains of. The rule for the *mandamus* must, therefore, be made absolute.

James Drummond v. The Commissioners of the Clinton and Port Hudson Railroad Company.

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A judgment creditor cannot treat a conveyance made by his debtor as null and seize the property so conveyed, in the possession of a third person. If the conveyance be illegal or void, he must sue such third person to annul to.

The commissioners appointed under the second section of the act of 26 March, 1842, ch. 159, providing for the liquidation of the affairs of the Clinton and Port Hudson Railroad Company, are authorized to perform all conservatory acts necessary to protect the interests of the State. They are the agents of the State, and, in that capacity, may sue and be sued.

Where in an action to recover certain slaves it is proved that defendant got possession of them illegally and fraudulently, and was the last person seen in possession of them, they will be presumed to be still in his possession. The burden of proving that he has parted with the possession is on him.

Appeal from the District Court of East Feliciana, Johnson, J. J. P. Bullard, for the plaintiff.

A. M. Dunn, for the defendants.

Garland, J. The plaintiff alleges, that he is the owner of three slaves purchased at a sale made by the marshal of the United States, under an execution in his own favor against the Clinton and Port Hudson Railroad Company, obtained in the Circuit Court of the United States, whom he alleges that Lafayette Saunders, Robert Perry, and David J. Fluker, as commissioners appointed to liquidate the affairs of the Railroad Company, have in their possession, and refuse to deliver to him. Two of the slaves, he avers that he never had in possession. One of them, named William, he had in his possession, but avers that he ran away and returned to the defendants. His title, he alleges, is good and legal, and he prays for a judgment decreeing him to be the owner of the slaves, and also for damages.

The defendants, after a general denial, affirm, that the plaintiff has never acquired any title to the slaves he sues for, and that

his possession of the slave William was illegal, forcible and frau-They aver, that at the time of the pretended sale under which the plaintiff claims, the slaves were not in the possession of the marshal; that they were not present when pretended to be sold, and were in fact, in the possession of the Sheriff of East Feliciana, under seizures made under other executions; that the amount bid by the plaintiff was not sufficient to cover older mortgages; and that the adjudication was improperly made, as said plaintiff did not assume such previous mortgages. They further declare that, previously to the rendition of the judgment under which the plaintiff claims, by an act of the Legislature and the assent of the company, the slaves had become the property of the State, and that the possession of the company was merely as agents, not as owners, and that the right of possessing and administering upon said slaves is now vested in the respondents, as commissioners of the State; wherefore, they pray to be confirmed in their possession. The defendants then reconvene, alleging that the plaintiff is in the possession of three slaves, named Lewis, Moses and Peter, who are of great value; that he obtained possession of said slaves illegally, forcibly and fraudulently, and holds them in bad faith; that said slaves also belong to the State, and that the defendants as commissioners, are entitled to recover them. They aver, that the wages or hire of the said slaves is equal to \$150 per month; and they ask for a judgment for said slaves, or their value, and for \$500 as damages.

The plaintiff gave in evidence a deed from the marshal of the United States, dated the 7th July, 1842, in which it is stated, that the three slaves claimed by the plaintiff, and the three claimed by the defendants of him, were seized and sold under an execution in his, plaintiff's, favor, against the said Railroad Company, and purchased by him, plaintiff, but not delivered, in consequence of the said slaves being then in the custody of the Sheriff of the parish of East Feliciana, who refused to surrender them. The defendants showed, that the Railroad Company purchased the slaves in controversy; and they gave in evidence the act of mortgage executed by the company, in June, 1839, for the purpose of securing the State from responsibility for the sum of \$500,000, for which its bonds had been loaned to the company,

under an act of the Legislature, passed in March, 1839. acts of 1839, p. 212. The second and fourth sections of the act referred to, provide in case the company shall not regularly pay the interest on the bonds loaned, or the principal when due, that the State shall have the right to foreclose the mortgages assigned and pledged to it, and to cause all the property to be sold, or that it may take such other steps for its indemnity as may be deemed The Railroad Company, in March, 1841, failed to pay the interest on the aforesaid bonds, and the Legislature then passed an act, which declares "that, by virtue of the second and fourth sections of the act aforesaid, the said road with all the machinery, fixtures, slaves, and appurtenances thereunto belonging, or in any wise appertaining, be, and they are hereby declared forfeited to the State, reserving to said company the right of redeeming the same, according to the provisions of the said act." The law then provides, that the company may continue to administer its affairs for and on behalf of the State, as long as it shall retain the ownership and control of the premises. See Acts of 1841, p. 74, sec. 2. Under this law the company continued to conduct its business, until the act of 26th March, 1842, was passed. See Acts of 1842, p. 458. This act directs proceedings to be instituted to have the railroad and all the mortgaged property sold, and to have the charter of the company forfeited, and commissioners appointed to liquidate the affairs of the corporation. virtue of this last act, the defendants were appointed, and on them the powers necessary to transact the business of the company are conferred. See sec. 2 of the act.

The parol evidence shows, that the slave Lewis is worth \$1500; that Moses is worth \$400, and Peter \$750; that Lewis is a blacksmith, and his services worth \$50 per month; and that the services of the other two slaves are worth each \$15 per month. A witness testifies, that these three negroes were not at the court-house on the day of sale, but were at Port Hudson, and that the plaintiff and the deputy marshal went there the next day, and got possession of them, under pretext of carrying them to Clinton, instead of which they took them away, and it is not shown where they now are. All the slaves were under seizure by the Sheriff of East Feliciana when the marshal made

his sale, and were in his possession. By some unexplained means, the marshal, got the three slaves in possession of the defendants into his hands, but the Sheriff immediately retook them; and none of the slaves were present when the plaintiff purchased. It is further proved, that after the passage of the act of 1841, the company administered its affairs as the agent of the State. It is admitted, that the three slaves claimed by the plaintiff are in the possession of the defendants, and that the plaintiff took away the three negroes claimed of him.

The court below gave a judgment of nonsuit against the plaintiff, and a similar judgment against the defendants on their demand in reconvention, from which both parties have appealed.

The 4th section of the act of 1839, authorized the State, in the event of a failure on the part of the company to pay the interest on any part of the principal of the bonds loaned, "to take such steps for its indemnity, as may be deemed advisable;" and when, in 1841, the company was in default, the State immediately took possession of the property, declaring it forfeited, and the corporation acted as its agent in administering it. venues from the railroad were ordered to be paid into the treasury, and full dominion has been exercised over the property. The act of the Legislature expressly recognizes the ownership as being vested in the State, and the agency of the corporation. It is then clear that, at the time of the pretended seizure by the marshal, the State had a title to all the property, and was in possession; and that officer had no right to disregard the title, and make a seizure. It is contended, that the State had no right to declare the property of the company forfeited; and the right accruing therefrom is said to be of no validity. This may possibly be true; but it did not authorize the plaintiff to disregard the claim, and proceed with his execution. It is well settled, that a judgment creditor cannot treat a conveyance made by his debtor as null, and seize the property so conveyed, in the hands of a third party. He must sue that party to annul the conveyance, if it be illegal or void. 5 Mart. N. S. 361, 634. 6 lb. N. S. 139, 325. 2 La. 214. 3 La. 479. There are many other objections raised against the title set up by the plaintiff, which we do not think it necessary to discuss, as the

one we have stated is fatal. We are, therefore, of opinion that the Judge did not err in his judgment.

Upon the demand in reconvention, the first objection is, that the defendants cannot, in their capacity of commissioners, reconvene and set up the claim they have done. The counsel for the plaintiff contends, that the right of action belongs to the State; and that the defendants cannot assert it in their capacity of commis-We think he is mistaken. By the act of 1841, the corporation, by its agents and attorneys, were authorized to do and perform all conservatory acts necessary to preserve the interests Similar authority is, in our opinion, vested in the of the State. defendants. They act for the State, are its agents, and may in that capacity sue and be sued. The plaintiff sues them as the agents of the State; and it would be somewhat strange if they could be made liable in that capacity, and not have the right of asserting the rights of the State entrusted to their management. We think the defendants are competent to urge the demand in reconvention; and, having shown that the sale under which the plaintiff claims is illegal, we are of opinion, that the defendants must recover the three slaves claimed by them.

The counsel for the plaintiff further objects, that it is not shown that the slaves claimed by the defendants are in the possession of the plaintiff, and therefore that they cannot recover. The evidence shows, that the plaintiff got possession of the slaves in an illegal and fraudulent manner. He admits that he took them away, and since then no trace of the slaves exists, so far as the record informs us. The plaintiff cannot be permitted to avail himself of his own wrong to protect himself. He got possession of the slaves under a false pretext; he carried them away from the parish, and was the last person seen in the possession of them; and when sued he asserts, that his adversary cannot recover, because direct proof is not administered of the slaves having been in his possession at the time. Upon the testimony before us, the presumption of the slaves being in the plaintiff's posession is so strong, as in our opinion to throw upon him the burden of proving that he has parted with his possession of them, which he has not attempted to do.

The evidence is full as to the value of the slaves, and of their

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services, enabling us to decide all the questions which the case presents.

It is, therefore, ordered and decreed, that the judgment of nonsuit against the plaintiff be affirmed; and it is further ordered and decreed, that the judgment of nonsuit rendered against the defendants, on their demand in reconvention, be annulled and reversed; and proceeding to give such judgment as in our opinion should have been rendered in the court below, we do order and adjudge, that the defendants, Saunders, Fluker, and Perry, in their capacity of commissioners, as set forth in the petition, do recover, for the use and benefit of the State of Louisiana, against the plaintiff, James Drummond, the slaves Lewis, Moses and Peter; and it is also decreed, that for the hire of the slave Lewis, the defendants recover of the plaintiff the sum of fifty dollars per month from the 8th day of July, in the year 1842, until said slave shall be delivered; and also that the said defendants recover of the plaintiff the sum of fifteen dollars per month for the hire of each of the slaves Moses and Peter, from the 8th day of July in the year 1842. until each of them shall be delivered, the plaintiff being a possessor in bad faith. And it is further ordered and decreed that, if the said James Drummond shall not deliver the aforesaid slaves to the defendants, and pay the hire decreed as above, within ninety days after the recording of this judgment in the inferior court. then the said defendants shall have judgment against said James Drummond for the sum of fifteen hundred dollars, the value of the slave Lewis, with interest thereon at the rate of five per cent per annum, from the 8th day of July, 1842, until paid; also for the sum of seven hundred and fifty dollars, the value of the slave Peter, with interest at the same rate from the date aforesaid until paid; also for the sum of four hundred dollars, the value of the slave Moses, with interest at the aforesaid rate, from the date aforesaid, until paid. The plaintiff to pay the costs in both courts.

Ex parte Powell.

EX PARTE THOMAS POWELL.

A debtor committed to prison, under the provision of the sixth section of the act of 28 March, 1840, for refusing to comply with a judgment ordering him to file a schedule or statement of his affairs as required by the fifth section of that act, cannot be discharged from imprisonment on the ground, that the amount required by the act of 17 March, 1820, to be paid weekly to the keeper of the jail, for the use of a debtor confined on mesne process, or under execution, has not been advanced for his use.

APPEAL from the District Court of the First District, Buchanan, J.

- J. C. Clarke, for the applicant. The failure of the creditors of Powell to advance the amount required by the first section of the act of 17 March, 1820, (2 Lislet's Digest, 279,) entitled the latter to his discharge. The proceedings authorized by the act of 28 March, 1840, were substituted for the writ of ca. sa., and the first section of the act of 1820, applies to a debtor confined under the provisions of the act of 1840.
- H. D. Ogden and Hoffman, contra, contended that the act of 1820 did not apply to the prisoner, who was confined for a contempt of court.

GARLAND, J. The petitioner represents, that he is imprisoned and deprived of his liberty by the Sheriff of the Criminal Court, who keeps him in the parish prison, at the suit of James Reed and Turner & Renshaw, under a pretended judicial order of the District Court, a copy of which is annexed. He avers, that this order is informal, and illegally obtained and executed, and is no sufficient legal warrant or commitment for the imprisonment of his person. That said process is not in the name of the State, and does not mention any adequate cause of detention for an indefinite term, and is not directed to any competent functionary; that it does not designate the period and place of imprisonment, and is deficient in all the legal requisites of a legal and valid warrant. He further states, that the sum of three dollars and fifty cents per week, the sum allowed by law for the use of a debtor in confinement, has not been paid by any one since his confinement in the month of July last. He, therefore, asks for a writ of habeas corpus, and that the Sheriff show under what process, and for what cause, he is detained, and that he be discharged.

Ex parte Powell.

The Sheriff, in obedience to the writ, produced the body of Powell, and returned, that he held him in custody under three different writs or commitments, which were produced; and he further states, that since the 26th of July, 1843, no one has paid him any money for the board of the applicant, who is, and has been supported by the State.

The first writ, or commitment returned under which the petitioner is held, is an order of the District Court, made in July, 1843, which states, that Powell had neglected and refused, after due notice of an order or judgment of said court, rendered at the instance of Reed, and Turner & Renshaw, to comply with it, by filing a schedule or statement of his affairs, wherefore the court orders that, in pursuance of the 6th section of the act of 1840 abolishing imprisonment for debt, the said Powell be imprisoned until he shall comply with the aforesaid judgment, directing him to file the schedule or statement of his affairs. The other two writs or commitments it is not necessary to notice, as the Judge below did not examine them or give any judgment on them, considering the first commitment or order of arrest sufficient to authorize him to remand the petitioner.

So far as we can ascertain the facts of the case from the record. which is very meagre, and the statements of the counsel in the briefs filed, it seems that Reed, and Turner & Renshaw, had commenced proceedings against the petitioner, under the 5th section of the act of 1840 abolishing imprisonment for debt, (Sess. Acts, p. 132,) to compel him to file a statement of his affairs and a schedule, preparatory to compelling him to make a surrender. A judgment to that effect was rendered, and notified to him. He neglected or refused for more than ten days to comply with the judgment, and has never appealed from it, so far as we are informed. The attention of the court being called to this neglect, or refusal to obey, by the counsel for the creditors, the order to imprison him was made, in conformity to the 6th section of the before mentioned act. This section gives the power in such a case to imprison, and no limitation is prescribed except a compliance with the judgment. Under this last order, or The Judge refused to disdecree, the petitioner is confined. charge him, and he has appealed.

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The counsel for the appellant has not drawn our attention to any particular informality, or omission in the order of commitment. It mentions the case, the names of the parties at whose instance it was rendered, and states that he must remain in custody until the previous order has been complied with. The chief, in fact the only reliance of the appellant is, that the sum of three dollars and fifty cents per week has not been paid, as it should have been, he being confined on process analogous to the writ of capias ad satisfaciendum; concluding that the old laws in relation to insolvent debtors in actual custody apply, although the first section of the act of 1S40 declares that that writ is "abolished." The counsel avers, that the only question is, whether the imprisonment authorized by the 6th section of the act is an imprisonment for debt, or for a contempt of court. In the usual acceptation of those terms, it is neither; but it is a means the law has given to compel a debtor, who is endeavoring to cheat his creditors by concealing his property, to make a statement of his affairs, and deliver up his effects to be administered for their common benefit. The remedy assimilates itself more to a punishment for a contempt, than it does to the process known as a ca. sa. The party has been heard on an allegation that he has property or assets; it is found to be true, and he is ordered to surrender them; he refuses to obey the decree, and is imprisoned; and he then wishes to make his creditors pay his expenses in jail. We think, with the Judge below, that he has no right to require it. He can, at any time, get out of his confinement under this commitment, by complying with the order of the court. Judgment affirmed.

PIERRE DUPEUX v. HIS CREDITORS.

Where notes given for the price of a tract of land are left in deposit with the notary by whom the act of sale was drawn up, the notes or their proceeds to be delivered to the vendor when the property sold shall be released from certain incumbrances, and the notary places them in a bank for collection, and suffers them to remain there after the bank had suspended specie payments, until the

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makers paid them in the depreciated notes of the bank, he will be responsible to the vendor for the full amount of the notes.

The second section of the act of 27 March, 1823, which declares "that no person who has made a surrender of his property for the use of his creditors, shall be admitted as a witness, except in cases of usury and unlawful contracts, in any civil suit brought either by the mass of his creditors against any of his creditors or debtors, or by any of the said debtors or creditors against the mass of the creditors of said person, on any contract, note or obligation entered into, drawn or executed, or subscribed by the said person previous to his having made a surrender of his property," is repealed by art. 3521 of the Civil Code. Art. 2169 of the Civil Code has no reference to that act.

Appeal from the Parish Court of New Orleans, Maurian, J. J. Seghers, for the appellant.

Marsoudet, for the syndic.

Martin, J. The insolvent having sold certain encumbered landed property, he and the purchaser agreed that certain notes, which he was to receive as part of the price, should remain in deposit with Theodore Seghers, the notary before whom the act of sale was passed, until the land should be disencumbered, and then be delivered to the insolvent. The syndic, on the land being disencumbered, demanded the notes from the notary, who answered, that he had placed them for collection in the Consolidated, Citizens' and Union Banks, in which they had been paid in notes of those institutions, which he had been compelled to receive from them, and which he tendered to the syndic, who repudiated the tender, and obtained a rule on the notary to show cause, why he should not deliver to the syndic all the notes deposited with him by the insolvent vendee.

The Parish Court gave judgment, that he should return to the syndic the sum of \$280, the amount of Macoin's note, paid in the Bank of Louisiana; the sum of \$250, in notes of the Consolidated Bank, the amount of Gurlie's note paid at said Bank; and \$280 in notes of the Union Bank, or specie, the amount of another note of Macoin.

From the judgment Seghers appealed; and the syndic has prayed, that the judgment, so far as it relates to \$250, the amount of Gurlie's note, be amended, and that the payment thereof be decreed in specie, and not in notes of the Consolidated Bank.

The record shows that Gurlie's note, and one of those of Ma-

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coin, were placed, immediately as the notary received them, in the Consolidated and Citizens' Banks; that both these institutions stopped specie payment in the latter part of May, 1842; that both notes were suffered to remain in those Banks until they were paid by anticipation, the one on the 18th and the other on the 22d of June, 1842, in the depreciated notes of these Banks. As to the other note of Macoin, neither of the parties complains of the judgment appealed from, as it was not paid in the depreciated paper.

The counsel for the appellant urges, that banks are the safest places of deposit for money and notes; but the appellee contends, that this is not the case with discredited banks, i. e., those whose notes are greatly depreciated, and from which neither money, nor anything nearly equal in value thereto, can be had; and that the appellant, as soon as he discovered that the Consolidated and Citizens' Banks were institutions of the latter kind, should have withdrawn the notes therefrom, to prevent the persons who were bound to pay them, from doing so in valueless paper.

The appellant has urged, that he took the same care of the notes deposited with him in his official character, as he did of his own. In proof of this he exhibited his bank books; but, the appellee's counsel has drawn our attention to these books, as being those only which related to the concerns of his office. The Parish Judge erred, in our opinion, in rejecting the syndic's demand for the amount of Gurlie's note in specie, and decreeing it to be paid in notes of the Consolidated Bank. We have not noticed that part of the judgment which relates to the note of Macoin, decreed to be paid in Union Bank notes or specie, because the appellee has not prayed for the amendment of the judgment in this respect.

The appellant attempted below to establish a ratification of his conduct by the insolvent, (in regard to the payment of Gurlie's and Macoin's notes in bank paper,) long before his insolvency. The testimony of the notary's clerk to that effect, has been opposed by that of the insolvent, who was attempted to be repelled from the book, under the act of 1823, (Bullard & Curry's Digest, 821, No. 3;) and a bill of exceptions was taken to the opinion of the First Judge, overruling the objection to his admission as a

witness. The court did not err. The Civil Code, art. 2169, to which we are referred to establish that the act of 1823 is still in force, has no reference to that act. The compilers of Bullard & Curry's Digest have retained it; but have informed us in the preface to that work, that the disability of the insolvent under that act, has been removed by the Civil Code, art. 3521. See Waters v. Blanchard, &c. 19 La. 584; and Johnson v. Marshall et al. 4 Rob. 157. The testimony of the insolvent at least balances that of the notary's clerk. No ratification is shown.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and that the appellee recover from the appellant the sum of five hundred and thirty dollars, the amount of one of Macoin's notes and that of Gurlie; and the farther sum of two hundred and eighty dollars in Union Bank notes or specie, the amount of Macoin's other note; with costs in both courts.

DANIEL TREADWELL WALDEN v. HENRY PARRISH.

Defendants sold to a third person, who occupied a building leased from plaintiff, certain boxes of merchandize, for the price of which the purchaser gave his note payable thirty days after date. The merchandize was delivered to the purchaser, and placed in his shop in the building leased from plaintiff. Two or three days after the sale, the purchaser absconded; but, on the eve of his departure, wrote to a third person to deliver the merchandize to defendant, and to get back the note given for the price. Defendant took the merchandize from the store of the purchaser and gave up his note, and resold the merchandize. In an action by the landlord against defendant to recover the value of the merchandize thus removed from the premises: Held, that the parties were in a condition to rescind the previous sale, and that defendant was not liable to plaintiff for the value of the merchandize.

APPEAL from the District Court of the First Distret, Buchanan, J. The petition alleged, that one Caldwell leased from the plaintiff two stores connected with each other, one for the annual rent of \$1200, and the other for \$800, the rent payable monthly. That Caldwell being in debt to the petitioner for rent in arrear and otherwise involved, did, within the preceding fourteen days, abscond. That after he had abandoned the premises, the

defendant, in violation of plaintiff's privilege as lessor, illegally and without his consent, did, within the preceding fourteen days, remove from the premises ten boxes of manufactured tobacco, weighing about 35 pounds each, and worth at least thirty cents per pound, and that he has since disposed of the tobacco so as to place it beyond the reach of the plaintiff. The petition prays, that defendant may be compelled to restore the tobacco, or to pay the value thereof, &c. The defendant answered by a general denial.

The defendant, in answer to interrogatories propounded by the plaintiff, stated, that he sold ten boxes of manufactured tobacco to Caldwell, on the 5th of February, for the price of which he took Caldwell's note, at thirty days, but without granting Caldwell any discharge from the debt by taking said note; that the boxes weighed each $148_{\frac{3}{100}}$ pounds; that the tobacco was sold for 30 cents the pound, and the note was for \$444 90; that on Monday, the 9th of February, he removed nine boxes of the said tobacco, and two three-quarter boxes of a different brand, from Caldwell's store, after purchasing the same from Caldwell, and returning to him his note in payment therefor; that he resold all the tobacco before the commencement of this suit, the nine boxes at 30 cents per pound, one of the three-quarter boxes at 121 cents and the other at 16 cents per pound, being an inferior article; that Caldwell's store was closed when he went to it for the purpose of removing said articles, which was during the ordinary business hours when such stores are usually open; that he had no reason to suspect that Caldwell had left, or was concealed for the purpose of secretly leaving the city, at the time of visiting his store; that on the morning of the 9th, Caldwell's clerk came to his counting-room, and stated to him, that Caldwell wished him to take back the tobacco, and give up the note given for the price; and that Caldwell wished him to go to his store and receive the tobacco, and hand over the note at the same time; that he (defendant) went to Caldwell's store, where he found the clerk, who pointed out to him one Conway who would deliver the tobacco and receive the note; that Conway, who had the key of the store, unlocked it, and delivered the tobacco, and received the note; and that Caldwell had solemnly pledged himself to pro-

test said note, so that he should lose nothing by giving him the credit.

Conway, examined by the plaintiff, stated, that he kept a store in the next house but one to that occupied by Caldwell; that he saw Caldwell for the last time on Sunday morning, between seven and nine o'clock; that he never saw Caldwell's store open after that morning; that his store was usually opened every morning by half past six or seven o'clock; that the key of Caldwell's store was handed to him by a young man whom he did not know; that when the key was delivered to him he was directed to deliver the tobacco to defendant; that defendant took the key from him and went into the store, which was kept open for twenty minutes, or less; that he saw nothing taken from the store by defendant but the tobacco, which was removed on Monday morning about breakfast time; the young man, as witness understood, had been living at the same boarding house with Caldwell; the key was sent to plaintiff after the tobacco had been removed.

Folsom, examined by plaintiff, stated, that he kept a store next door to Caldwell's; that the last time he saw Caldwell was on the Saturday preceding the removal of the tobacco; that he did not see Caldwell's store open after that day, except when Parrish removed the tobacco; that at the time of removing the tobacco, he heard several persons say, that Caldwell had run away; thinks he had heard that Caldwell had run off, before defendant took the tobacco away.

Haskell, examined by plaintiff, stated, that he lived next door to Caldwell's store, and that he saw Caldwell, for the last time, on the Saturday preceding the removal of the tobacco.

Smith, a clerk of defendant's, examined by plaintiff, deposed, that he heard Parrish say, that Caldwell had gone off when he went after his tobacco; believes that Parrish was in a hurry to get the tobacco back into his possession.

Louisa Newton, a witness for the plaintiff, stated, that Caldwell boarded at her house until the morning of Sunday, the 8th of February, when he left after breakfast, without settling his account, and that she has not seen, nor heard of him since.

White, another witness for plaintiff, stated, that on Monday,

the 9th of February, between eleven and twelve o'clock, he received a letter written and signed by Caldwell, which was offered in evidence. So much of the letter as is of any importance, is transcribed:

"New Orleans, Saturday, 7th Feb. 1840.

" Mr. John N. White,

"SIR: I am sorry to have to trouble you on such a disgraceful communication, but it cannot be helped at this time. I have met with some losses and disappointments, and my neabour Lea & Co. closing doores has put a shock on me. I have sent my man Barron to Galveston with a small lot of goods on speculation, and fearing he would not return quick, my creditors would put me in the calaboce and not give me a fair chance to get clear, I have made my mind up to gow up the river as far as Nacatoch, and cross over to Texas. You will please attend the store, and see what I do ow. I have all the bills and receipts with me. My intentions is not to defraud any person; they shall be paid. I will be able to pay all as it comes due except Mr. Bagley for sugar, and Mess. Varian, and Ogden & Southgate. I have told one or two I was going home, but you got the whole Tell Mr. Parrish on Poydress street, to take his tobacco back. I bought ten boxes, at 30 days, at 30 cents. He holds my note for the same: get my note back. He can claim the tobacco: it bears his mark, Richmond. * But if my creditors is gentlemen, and will not go to extremes with me, I will be in Orleans in thirty or forty days, and pay all I ow; the whole is not more than \$3000—say \$2400, with rent. Please see them all for me. No more, but your troubled friend,

"John Caldwell."

On the back of this letter, under the direction, was written: "This letter will give all inquiring friends information abot the subscriber in heast,

J. CALDWELL."

Plaintiff offered in evidence the record of an action in the Commercial Court, from which it appears, that on the 14th of February, plaintiff as Caldwell's lessor, obtained an order for the provisional seizure of the property in his stores, and of the leases thereof, and that a judgment was subsequently rendered in favor of the plaintiff against Caldwell for \$1862 24, and ordering the

property provisionally seized to be sold to satisfy the same. The return of the Sheriff showed that the nett proceeds of the sale amounted to but \$310 88.

No evidence was introduced on the part of the defendant.

The court below rendered the following judgment: "Considering that articles 2294, and 2679 of the Civil Code are inapplicable to this case; and further considering that the plaintiff has shown no cause of action: It is adjudged and decreed, that there be judgment for the defendant, with costs." The plaintiff appealed.

M. M. Robinson, for the appellant.

Peyton and I. W. Smith, for the defendant.

GARLAND, J. The plaintiff claims of the defendant ten boxes of manufactured tobacco, weighing each 148 lbs., or the value of them at 30 cents per pound, on which he alleges that he has the privilege of the lessor. The facts are, that in the autumn of the vear 1839, the plaintiff leased to John Caldwell & Co., a store in New Orleans, at the rate of \$100 per month. Caldwell & Co. occupied it until about the 8th of February, 1840, when Caldwell, the resident partner, disappeared without paying the rent, and has not since been heard of. On or about the 5th of February, the defendant sold Caldwell & Co. the ten boxes of tobacco, on a credit of 30 days, and took a note for \$444 90. When Caldwell was about to leave, he wrote a letter to one of his friends, in which he says: "Tell Mr. Parrish on Povdras street, to take his tobacco back. I bought ten boxes, at thirty days, at 30 cents. He holds my note for the same. Get my note back. He can claim the tobacco, as it bears his mark." On the 10th of February, when the defendant was informed of the proposition of Caldwell, he agreed to take back the tobacco, and give up the note, and went to Caldwell's agent for the purpose of getting the tobacco and giving up the note; and the arrangement was carried into execution by the delivery of the note to Conway, and of nine of the boxes of tobacco sold by the defendant Parrish to Caldwell & Co.; but as one box had been sold, the defendant took two three-quarter boxes of tobacco of an inferior quality, upon which he had no claim, in place of the one sold by Caldwell.

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Upon these facts the Judge of the District Court gave a judgment in favor of the defendant, relying on articles 2294 and 2679 of the Civil Code.

So far as the judgment relates to the nine boxes of tobacco, we think the inferior court did not err, as, at the time the contract took place, we think the parties were in a situation to rescind the previous sale; at any rate, that Caldwell was competent to sell the property, when he authorized White to make the proposition to the defendant. The latter had the privilege of the vendor on the tobacco; and we think the case comes fairly within the meaning of the articles of the Code cited in the judgment.

But as relates to the two three-quarter boxes of tobacco, the case is different. Caldwell did not propose to sell them to the defendant, nor to authorize White or Conway to sell or deliver them to him. He, therefore, had no right to take these two boxes of tobacco, and must account for them; but as the record does not show how much these boxes weighed, although the value per pound is stated, we are compelled to remand the case to ascertain how much the defendant must account for.

The judgment of the District Court is, therefore, affirmed, so far as it relates to the nine boxes of tobacco sold and delivered by Caldwell's agent to the defendant; but so far as it relates to the two three-quarter boxes of tobacco, the judgment is reversed, and the case remanded for a new trial, to ascertain its value. The costs of the appeal to be paid by the appellee.

SAME CASE.—ON A RE-HEARING.

M. M. Robinson, for the plaintiff, having obtained a re-hearing, contended that the judgment of the lower court should be reversed in toto. The tobacco belonged to Caldwell at the time of its removal from the building leased to him by plaintiff. The testimony of Smith shows, that defendant removed it after he was aware that Caldwell had absconded as an insolvent. Defendant having sold the tobacco on a credit, had no right of reven-

dication, (Civ. Code, art. 3196,) and his privilege as vendor was inferior to the landlord's. Civ. Code, arts. 2675, 2679, 3184, 3225, Troplong, Priv. et Hypoth. vol. 1, No. 194. Duranton, vol. 3, tit. 18, No. 87. The resale by Caldwell to Parrish was in tiempo inhabil, and an attempt to give the latter an illegal advantage over the other creditors of the insolvent. It was fraudulent and void. See Brown v. Kenner, 3 Mart. 273. Meeker v. Williamson, 4 Mart. 626. Canfield v. Maher, 4 Mart. N. S. Saul v. His Creditors, 5 Mart. N. S. 620. Taylor v. Knox, 2 La. 18. Ingham v. Thomas, 6 La. 83. Zacharie v. Buckman, 8 La. 308. Muse v. Yarborough, 11 La. 530. fendant having illegally removed and converted to his own use property on which plaintiff had a privilege for the payment of his rent, is bound to repair the injury which the latter has sustained in consequence. Civ. Code, art. 2294. The question which this case presents is, whether an absconding insolvent can alter, by a pretended sale made at the moment of absconding, the relative privileges of different creditors on the property left by him, and thus give a preference not known to the law, to one creditor over another.

Peyton and I. W. Smith, for the defendant. There is no legal proof that Caldwell was indebted to plaintiff. The record offered in evidence by plaintiff was a proceeding in rem, and is, as to the defendant in this case, res inter alios. It is not proved that Caldwell was insolvent, nor is it alleged in the petition. There was nothing illegal in the removal of the tobacco by defendant. Art. 2679 of the Civil Code, gives a privilege on the property only; and there is no allegation in the petition that the tobacco could not be found; or, if there be, the evidence does not support it; nor is there any allegation that it was removed to deprive the plaintiff of his privilege, nor that it operated to his injury. Plaintiff has not shown that, after exhausting the property of the defendant, anything is due to him. He must, in any event, exhaust Caldwell's property before he can proceed against the defendant.

MARTIN, J. The plaintiff is appellant from a judgment which denied him the landlord's privilege on a quantity of tobacco in a store of his. We affirmed a judgment of the District Court, in

April, 1842, as to the greatest part of the tobacco, and reversed it as to two three-quarter boxes, remanding it as to the latter. We were prevailed upon to allow the plaintiff and appellant a re-hearing, and have read with attention his objections to our first view of the case. The argument does not appear to have extended beyond that with which he had favored us on the first hearing; and we are not satisfied that the judgment theretofore given should be changed. It must, therefore, remain undisturbed.

THE STATE v. WILLIAM H. WILLIAMS.

Where the judge of an inferior court refuses obedience to an order of the Supreme Court directing him to allow an appeal, he may be committed to prison until he complies with such order.

The Legislature having made no provision for the exercise of criminal jurisdiction by the Supreme Court, and the court having repeatedly declined to assume it, the question can no longer be considered as an open one.

The first section of the statute of 29 January, 1817, forbidding the introduction into this State of slaves convicted of certain crimes, and denouncing a fine of five hundred dollars for every slave brought into the State in violation of its provisions and the forfeiture of the slave, one-half for the use of the State and the other half for the use of the informer, creates an indictable offence; and where the proceedings against one charged with a violation of the statute were by indictment, no appeal will lie from a sentence pronounced on the verdict of a jury, declaring the slaves so imported to be forfeited, and condemning the offender to pay the fine imposed by the statute and the costs, and to stand committed until they are paid.

By the common law every act contra bonos mores, is an indictable offence; but no such mass of undefined offences exists in this State. Nothing is punishable here which is not made an offence and the punishment denounced by legislative authority; but whatever constitutes an offence against the public by act of the Legislature may be prosecuted by indictment, unless a different mode of proceeding be expressly provided for.

WILLIAMS prayed that a mandamus might be issued to the Judge of the Criminal Court of the First District, to show cause why an appeal should not be allowed to him in this case. He alleges: that on the 29th of January, 1817, the Legislature of this State passed an act, entitled "An act supplementary to an act

concerning the introduction of certain slaves from any of the States or Territories of the United States of America:"

That the 1st section of the act provides, that every person who shall bring into this State any such slaves, knowing that they have been convicted of any crime specified in the said act, shall be fined for each and every such slave, in the sum of five hundred dollars, one-half to be applied to the use of the State, and the other half to the use of the informer:

That the penalty imposed by this statute, being merely a fine or pecuniary penalty, the amount of which is fixed by the statute itself, is in the nature of a debt; and that the proper remedy in case of a violation of the statute, would upon general principles and according to the well established rules of the common law, be by an action upon the statute to recover the penalty:

That penal actions are civil suits; and that the amount of the penalty for a violation of this statute, being five hundred dollars, any person condemned to pay a penalty under the statute, has a constitutional right of appeal to this tribunal:

That by an act of the Legislature of this State, passed in 1832, the Criminal Court of the First District, was vested with jurisdiction in certain specified civil cases:

That it was authorized by the first section of said act, to exercise exclusive jurisdiction in all cases of forfeited bonds and recognizances in criminal prosecution; provided, that where the amount in any case should exceed three hundred dollars, the condemned party might appeal to the Supreme Court according to law:

That by the second section of said act, the said Criminal Court, was given "jurisdiction of all suits and prosecutions on penal statutes, and all suits and prosecutions instituted in behalf of the State for any violation of a public law, reserving to the parties the right of appeal to the Supreme Court, in all cases in which an appeal is allowed by law."

That on the 17th day of February, 1841, a prosecution was instituted in the said Criminal Court of the First District against this petitioner, for an alleged violation of the statute of January 29th, 1817, and that after various proceedings, he was condemned to pay the sum of twelve thousand dollars, that is to say, "five

hundred dollars for each and every one of twenty-four slaves, illegally brought into this State in violation of the above quoted act," and was ordered to be committed to jail until the said penalty, and the costs of the prosecution were paid:

That having previously made an unsuccessful motion in arrest of judgment, he presented his petition on the 24th day of July, 1841, to the Judge of the Criminal Court of the First District, praying for a suspensive appeal from the final judgment rendered against him in said case to the Supreme Court of the State according to law, on his giving the security required by law; but that the Judge immediately refused an appeal, declaring that it was not an appealable case:

That this petitioner is thus deprived of his right to appeal to this court, from a final judgment rendered against him in a civil suit for more than three hundred dollars, in violation of the right secured to him by the constitution and laws of the State of Louisiana; and that he has been illegally imprisoned in the parish jail of Orleans, from the said 24th day of July, and is still therein incarcerated in consequence of a denial of justice to him, and in virtue of a judgment, which he is informed and verily believes to be clearly erroneous.

A rule having been granted on the Judge of the Criminal Court of the First District, to show cause why a mandamus should not be issued commanding him to allow an appeal to the defendant, Canonge, J., showed for cause, that the Supreme Court is without jurisdiction in criminal cases; that the defendant was prosecuted criminally for an offence or misdemeanor committed in violation of a public law of the State; that said prosecution was commenced by an indictment found by a grand jury, followed by the arraignment, plea, trial, conviction and sentence of the accused; that the proceeding was not a civil suit, nor one in which the constitution and laws of the State allow an appeal to the Supreme Court, &c.

The rule was made absolute, and the Judge of the Criminal Court ordered to grant an appeal, reserving to the Attorney General, or other representative of the State, the right to move for its dismissal on the ground of want of jurisdiction.

The Judge of the Criminal Court having refused to obey

the order commanding him to allow an appeal for the reasons assigned by him in answer to the rule, on motion of the counsel for Williams, the Sheriff was directed to commit him to prison, and there to keep him until he should grant the appeal prayed for. Upon being informed of this order, the Judge granted the appeal, protesting at the same time against the jurisdiction claimed by the Supreme Court.

The indictment on which the defendant was tried represents. "that William H. Williams, late of the city of New Orleans, in the parish of Orleans, on the 1st day of November, in the year of our Lord, 1840, with force and arms, in the parish of Orleans aforesaid, and within the jurisdiction of the Criminal Court of the First District, to wit, the First Judicial District of the State of Louisiana, did import and bring into this State, to wit, the State of Louisiana, twenty-four slaves, named [giving their names] which slaves then and there had been convicted of the crimes of murder, burglary, rape, arson, manslaughter, attempt at murder, and of having raised and attempted to raise an insurrection among the slaves in one of the States of the Union, to wit, the State of Virginia; he, the said William H. Williams, then and there well knowing that the said slaves had been convicted in the State of Virginia aforesaid of the above mentioned crimes each as follows, [specifying the crime of each, and the court before which the conviction was had,] contrary to the form of the statute of the State of Louisiana, in such case made and provided,* and against the peace and dignity of the same." The in-

^{*} The first section of the statute of 29 January, 1817, under which Williams was indicted, is in these words:

[&]quot;Sec. 1. Be it enacted, &c., That no slave shall be imported or brought into this State, who shall have been convicted of the crimes of murder, rape, arson, manslaughter, attempt to murder, burglary, or having raised or attempted to raise an insurrection among the slaves in any State of the Union, or elsewhere; and if any such should be, they shall, on conviction thereof, be seized and sold for cash to the highest bidder, after fifteen days notice of time and place of sale, one-half of the purchase money to be applied to the use of the State, and the other half to the informer; and every person who shall import or bring into this State such slaves, knowing that they have been convicted of any of the above mentioned

dictment was found by the grand jury to be a true bill. Williams, on being arraigned, pleaded not guilty.

A statement of facts agreed to by the Attorney General and the counsel for the defendant represents: "That the slaves mentioned in the indictment and now confined in prison, were all duly and legally convicted of the crimes mentioned in the indictment, by courts of competent jurisdiction in the State of Virginia, and were all sentenced to death for said crimes, by said courts, in said State, but were reprieved by the Governor of Virginia, for sale and transportation beyond the limits of the United States, according to the laws of Virginia: that Williams entered into a bond to transport the slaves beyond the limits of the United States: that the slaves imprisoned at the commencement of this prosecution are those mentioned in the indictment: that the said slaves were the property and under the charge of Williams when they arrived in this State at the time mentioned in the indictment; and that he came to this State with them from the State of Virginia, by way of Mobile." It was also agreed by the counsel, that the printed statute books of Virginia might be read on either side as the law of Virginia.

A jury having found a verdict of guilty, and a motion in arrest of judgment being overruled, the court pronounced a judgment, in which, after reciting, that as there was no informer the whole amount of the fines and forfeitures accrued to the State, it declared the said slaves forfeited to the State, and condemned Williams to pay a fine of \$12,000, or \$500 for each of the twenty-four slaves brought by him into the State in violation of law, and ordered him to stand committed until the fine and costs are paid. From this judgment, or sentence, an appeal was prayed for by Williams, and finally allowed as stated above.

The counsel for the appellant assigned as errors apparent on the face of the record:

1st. That the proceeding by indictment is contrary to law, the



crimes, shall upon conviction before any court of competent jurisdiction, be fined for each and every such slave in the sum of five hundred dollars, one-half to be applied to the use of the State, and the other half to the use of the informer."

appropriate remedy being an action of debt, or an information in debt on the statute, or any other ordinary civil proceeding for the recovery of money.

- 2. That the judgment, or sentence pronounced by the court, a qua, is illegal and erroneous, inasmuch as it condemned the defendant to stand committed until the judgment be satisfied. 6 Johns. Rep. 507.
- 3. That it condemns him to pay costs, without saying or ascertaining what costs. 1 Cowper, 60.
- 4. That the said judgment is erroneous, inasmuch as it purports to be in a proceeding *in rem*, and condemns the property of the defendant to forfeiture and confiscation, as if the same had been prosecuted or informed against, whereas the whole proceeding was on the criminal side of the court by indictment, and against the person of the defendant only, and the only issue made, or tried, was on the plea of not guilty to the indictment.
- 5. That it appears from the whole record, that the proceedings have been a mixture of criminal and civil matter, inconsistent, repugnant, and contrary to law.

Roselius, Attorney General, on behalf of the State, moved to dismiss the appeal for want of jurisdiction.

- R. Hunt, for the appellant. There are two questions in this case: 1st. Is the defendant entitled to an appeal? 2d. Is the judgment erroneous?
- I. The right of appeal is a great constitutional right. It is to be favored; it is not to be restricted to civil cases; the constitution is merely directory as to the civil cases to which it shall extend. Const. of La. art. 4, sec. 2. Suppose the right to be restricted to civil cases, then the case before the court should have been a civil suit. The statute upon which this prosecution was based, is purely penal. Nothing is inflicted by it, but a pecuniary penalty or fine; no imprisonment, no punishment; nothing but a definite, fixed pecuniary penalty. 2 Moreau's Dig. 385. Act January 29, 1817, sec. 1. At common law, a penal action, or action to recover a peralty, is a civil suit. The usual remedy in cases of a pecuniary penalty, is an action or information of debt. An indictment will not lie for such a penalty, un-

less specially allowed by statute; for it is properly recoverable as a debt; and is in no just sense a criminal proceeding.

Blackstone says, the remedy to recover a pecuniary penalty fixed by statute, is by "action of debt;" and he bases his opinion on the doctrine of implied contracts. 3 Blac. Com. 160, 161, 162.

Bacon maintains the same doctrine. Bacon's Abr. title, Actions qui tam, in notes. Ibid. title, Debt, letter A.

In Salmon's case, for practising physic without a license; the exception that debt will not lie to recover the penalty, was overruled. 1 Lord Raymond's Rep. 680, (exception 4th.)

In Bowman's case, for keeping false weights, and trying to corrupt an officer, Eyre declared the information for the penalty a civil proceeding. 2 Bos. & Puller, 532, in notes.

In Atcheson's case for bribery at an election, penal actions were decided to be civil suits. 1 Cowper's Rep. 382.

The statutes of jeofails and amendments, do not extend to criminal proceedings; but it has been invariably held, that penal actions are within those statutes, and may be amended. 1 Bacon's Abr. title, Amendment and Jeofail, A. and C. 2 Str. 1227. 2 Dallas' Rep. 143. 1 Gallis. Rep. 23.

In cases of acquittal on criminal prosecutions, no new trial can be granted, but new trials may be granted in penal actions. 4 Blac. Com. 361, 362. 4 Durnf. & East, 753.

In Malland's case, on an indictment to recover a pecuniary penalty, no method being pointed out or prescribed in the statute, by which it should be recovered, on demurrer it was held that an indictment would not lie, and that the proper remedy was debt, to be sued for in a court of revenue and not by indictment. 2 Str. 828.

All this doctrine has been fully recognized by American courts. 7 Prac. Abr. Am. Com. Law Cases, 289, title, Penal Statutes, 2, Form of the Action, note, and p. 290, citing 1 N. Hamp. Rep. 339. "The court held, that where the Legislature did not provide a specific remedy, debt would lie." And Adams v. Woods, 2 Cr. 336, where the court held, &c., that "almost every fine or forfeiture under a penal statute might be recovered in an action of debt, as well as by information of debt."

Judge Story says, "at common law, wherever a penalty is given, and no method of recovery is prescribed by the act, an action, or information of debt lies, and not an indictment," and cites in support of this, 2 Str. 828, and 2 Cranch, 336. See 2 Gallis. Rep. 554.

In the case of *The United States* v. *Lyman*, the same doctrine is again put forth, with great clearness. 1 Mason's Rep. 498.

In 1838, the doctrine is once more explicitly declared by Judge Story, after a full examination. He says, "the usual remedy in cases of a pecuniary penalty is an action or information of debt, an indictment for such a penalty will not lie, unless specially allowed by statute, for it is properly recoverable as a debt in a court of revenue by the government; and is in no just sense a criminal proceeding." 3 Sumner's Rep. 120, 121.

The acts of our own Legislature recognize this doctrine. 1 Moreau's Dig. 371, (acts of 1805,) p. 388, (acts of 1818,) p. 402, (acts of 1821.) The act of 1832, giving the Criminal Court of the First District jurisdiction of all suits and prosecutions, gave necessarily all the powers requisite to enforce their judgments in such cases; and the court has exercised them. See acts of 1832, p. 98.

In recovering a penalty, the usual remedy ought to be resorted to in case of any doubt, and not a summary mode. 3 Caines' Rep. 259, 260. 1 Moreau's Dig. 388.

The amount involved in this suit, being more than \$300, and the act of 1832 expressly guarantying the right of appeal in cases where an appeal is allowed by law, and penal actions being civil suits; it follows, that the defendant is, under the constitution, entitled to an appeal.

The Attorney General has cited 4 Bacon's Abr. 498, title, Indictment, 1 Hawk. Pleas of the Crown, 288, and a case from the State Trials, to show that an indictment would lie in this case; on the principle, that when a new offence is created by an act of Parliament, and a penalty is annexed to it by a separate clause, the prosecutor is not bound to sue for the penalty, but may proceed to indict on the prior clause, for a misdemeanor.

By referring to 4 Bacon's Abr. it will be seen that the autho-

rity referred to by Bacon, is the case of The King v. Harris, 4 Durn. & E. 202-206.

The great point in that case was, whether the disobedience of an order of the King made in pursuance of an act of Parliament, was an indictable offence at common law, and the court decided that it was.

To do an act, prohibited by statute, is a misdemeanor, and punishable as such at common law by fine and imprisonment. Any violation of a prohibitory statute, is therefore indictable, as a misdemeanor at common law. If, therefore, a statute prohibits the doing of any act in one clause, and in another and separate clause annexes a penalty, he who violates the statute, may be indicted under the prohibitory clause, and punished by fine and imprisonment as for a misdemeanor at common law; for by the common law, every misdemeanor is so punishable. But if the penalty is sought to be recovered, it can only be recovered by action of debt, unless otherwise provided specially by the statute; and hence, if the penalty and the prohibition are in one and the same clause, no indictment will lie. Now we have no common law offences in Louisiana. All crimes and offences against our law, are created and punished by statute. If the Legislature merely prohibits the doing of any act, and annexes no punishment to the doing it, no one is punishable for violating it. have no punishment at common law, or by common law; consequently we could not indict or punish a violation of a law which merely forbids, but does not prescribe any punishment for a certain act. This principle explains at once the error of the Attorney General. Having no common law, Williams can not be indicted and punished under the mere prohibitory clause of the act of 1817, as for a misdemeanor at common law. If the penalty is sought to be recovered, it can only be by civil suit. An indictment will not lie for it. The case of The King v. Harris, in 4 Durn. & E. 202, 206; and the doctrine in 4 Bacon's Abr. title, Indictment, p. 498, and in the note will fully illustrate this.

The Attorney General cited three cases from 23 and 24 Pickering's Reports, to show that, by the common law, a penalty may be recovered by indictment, as the penalty for presuming to sell

spirituous liquors without a license in Massachusetts. Rev. Stat. ch. 47, sec. 1.

But the 26 and 27 sections of that law, are in these words. Section 26, "All the fines imposed in this chapter, may be recovered by indictment, &c."

Section 27, "When any person shall be convicted under the provisions of this chapter, and shall fail to pay the fine awarded against him, he may be imprisoned in the common jail for a time not exceeding ninety days, &c."

So that it is only in virtue of a special provision of the statute of Massachusetts, and not by the common law, that those indictments for penalties are allowed. Now we have no such special provision in the act of 1917, and, therefore, no indictment can lie.

II. Is the judgment erroneous?

It follows from what has been said that all the proceedings in this case are irregular and void. For the errors, see the assignment of errors, filed in this case.

Grymes, on the same side.

MARTIN, J. During the term of this court, in December last, the Judge of the Criminal Court, on a rule against him to show cause why a *mandamus* should not be issued commanding him to grant an appeal to the defendant in this case, showed for cause:

1st. That this court is without jurisdiction in criminal cases.

- 2d. That the defendant was indicted, arraigned, tried, and received sentence for the violation of a public law of this State.
- 3d. That the present suit is neither a civil one, nor one in which the constitution and laws authorize an appeal to the Supreme Court.

The rule was made absolute; but right was reserved to the Attorney General to move for the dismissal of the appeal after the record should be filed, on the ground of absence of jurisdiction in this court.

The record having been received, the counsel for the defendant assigned the following errors as apparent on its face:

1st. The proceeding by indictment in the present case, is contrary to law; the appropriate remedy being an action of debt,

or an information in debt on the statute, or any other ordinary civil proceeding for the recovery of money.

2d. The judgment or sentence pronounced by the court, a quaris illegal and erroneous, inasmuch as it condemned the defendant to stand committed until the judgment should be satisfied. 6 Johns. Rep. 507.

3d. That it condemns him to pay costs, without saying or ascertaining what costs. 1 Cowper, 60.

4th Inasmuch as it purports to be a proceeding in rem, and condemns the property of the defendant to forfeiture and confiscation, as if the same had been prosecuted or informed against: whereas, the whole proceeding was on the criminal side of the court by indictment, and against the person of the defendant only, and the only issue made or tried was on the plea of not guilty to the indictment.

5th. It appears from the whole record of the proceedings, that the same have been a mixture of criminal and civil matter, inconsistent, repugnant, and contrary to law.

The Attorney General has availed himself of the right reserved to him at the time the *mandamus* was ordered, to move for the dismissal of the appeal, on the ground of absence of jurisdiction in this court.

The view which I have taken of this case, has restricted my attention to the question of jurisdiction, and to the first assignment of error, both of which I have considered together. The indictment is grounded on the first section of an act of the Legislature passed in the year 1817, which forbids the importation into this State, of any slave "who shall have been convicted of the crimes of murder, rape, arson, manslaughter, attempt to murder, burglary, or having raised, or attempted to raise an insurrection among the slaves in any State of the Union or elsewhere; and if such should be, they shall, on conviction thereof, he seized and sold for cash to the highest bidder, after fifteen days notice of time and place of sale, one-half of the purchase money to be applied to the use of the State, and the other half to the informer; and every person who shall import or bring into this State such slaves, knowing that they have been convicted of any of the above mentioned crimes, shall, upon conviction before any court of compe-

tent jurisdiction, be fined for each and every such slave in the sum of five hundred dollars, one-half to be applied to the use of the State, and the other half to the use of the informer."

The right of suitors to resort to this tribunal for relief against the errors of inferior ones, is one of those thought by the people of so great value, that they have not considered the sanctuary of the law as a repository sufficiently safe for it, but have locked it up in the tabernacle of the constitution.

Although more than thirty years have elapsed since the formation of our constitution, doubts are still entertained by many sensible and well meaning persons, whether this tribunal may sustain appeals in a case like the present. The second section of the fourth article of that instrument declares, that "the Supreme Court shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases, when the matter in dispute shall exceed the sum of three hundred dollars." This section contains a double proposition; the first is extremely plain, and one would hardly think that a doubt could arise thereon. The jurisdiction is declared to be appellate only; original jurisdiction is clearly The second proposition is certainly susceptible of two meanings. Its object is confined to the civil jurisdiction of the court, and the intention of the framers of the constitution was doubtless to insure to suitors a resort to this court in all civil cases, when the matter in dispute exceeds three hundred dollars: but it may be doubted whether it was intended to exclude appeals in civil cases of less value, or to leave to the Legislature the power of authorizing, or denying appeals in those cases, at its discretion. No mention is made in either of these propositions of appeals in criminal cases, which are included in the first, if they be not excluded by the second. It cannot, perhaps, be assumed, that the restriction of the jurisdiction of this court in civil cases, was an exclusion of its jurisdiction in criminal cases, the exercise of which was necessarily suspended, until provision therefor should be made by the Legislature, and the power of which was restricted indeed in civil matters, but not at all in criminal.

This court is a special guardian and protector of the constitutional rights of the people. Its trust is one of extreme delicacy, and is always exercised with the utmost caution. Although in

the solution of constitutional questions, we cannot surrender our opinions to that of any man or body of men, we have frequently. and especially in the case of Maxent v. Maxent et al. 1 La. 452, said, that although an act of the Legislature cannot make that constitutional which is not so in truth, it must have a powerful influence on our deliberations, when we are endeavoring to fix the true construction of an article of the constitution. The opinion of the legislative and executive branches of the government, sworn, like the judiciary, to maintain the constitution, acting under every obligation which duty and conscience can impose, is certainly a strong, though not a conclusive reason to induce others, where the case is not clear, to adopt their construction. It has all the weight which authority, independent of reason, can have in any case; and if the subject be one on which doubt exists, it is the duty of the other branches of the government to adopt the construction—the peace of society emphatically requires it.

So early as 1798, Judge Chase said: I never will decide any law to be void, but in a very clear case; and the late Chief Justice of the United States, in delivering the opinion in the case of The Dartmouth College v. Woodward, (4 Wheat. 518,) observes: "On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution."

We have an interpretation of the part of the constitution under consideration, by the first Legislature of the State after its admission into the Union, in the legitimate exercise of legislative functions. It is found in 1 Moreau's Dig. p. 18, in an act for the appointment of notaries, regulating their tenure of office, and the manner in which they are to be suspended and removed therefrom, in case of misconduct; proper objects most certainly of the attention of the Legislature. This exposition is the more valuable as one almost contemporaneous with the constitution; and the presumption is very great, that many of the members of the convention who had framed that instrument, had seats in the first Legislature which sat under it. That Legislature expressed its opinion, that the Supreme Court had jurisdiction of offences com-

mitted by notaries in the exercise of their office. Had they not attempted to give original jurisdiction to this court, but directed the suspension of the notaries to be pronounced by any other tribunal, and given us appellate jurisdiction only, we probably would have long paused before declining obedience to their acts, on the ground of unconstitutionality.

We have a much later exposition of the constitution by the Legislature in regard to the present case, in an act approved March 16, 1832, p. 98, the second section of which provides: "That the Criminal Court of the First District shall have jurisdiction of all suits and prosecutions on penal statutes, and all suits and prosecutions instituted in behalf of the State for any violation of a public law, reserving to the parties the right of appeal to the Supreme Court, in all cases in which an appeal is allowed by law." The opinion of the Legislature is here clearly expressed, that there are suits and prosecutions on penal statutes, and suits and prosecutions on behalf of the State for violations of public laws, in which a resort to this court by appeal is allowed by law. The counsel for the appellant contend, that the case of their client is one of those in which the Legislature, in the second section of the act of 1832, recognizes his right of appeal. Whether the suit or prosecution be considered as one on a penal statute, or one instituted by the State for the violation of a public law, (admitting for the sake of argument that the jurisdiction of this court is confined to civil cases,) for the act on which the suit was brought is purely penal, nothing is inflicted by it but a pecuniary penalty or fine; no imprisonment, no punishment; nothing but a definite, fixed, pecuniary penalty. The obligation of the defendant to pay the fine imposed by the Legislature, is merely a civil one, which might be extinguished by payment; and there can be no doubt that the receipt of the Treasurer for the fine would have protected him from any state prosecution; nor that, on his neglecting to pay, the Attorney General might institute a suit for the fine on behalf of the State in the Court of the First Judicial District, or in that of the parish of Orleans, although neither of these courts be clothed with criminal jurisdiction. The act of 1832, last cited, gives to the Criminal Court of the First District a concurrent jurisdiction with the district and parish courts; and there cannot Vol. VII.

be any doubt that the Attorney General had the choice of these three courts, for the institution of a civil suit to recover the fine.

One of the counsel for the defendant has urged that, at common law, a penal action, or action to recover a penalty, is a civil suit. The usual remedy, in cases of a pecuniary penalty, is an action or information of debt. He has referred us to the following very numerous authorities: An indictment will not lie for such a penalty, unless specially allowed by statute; for it is properly recoverable as a debt, and is in no just sense a criminal proceeding. Blackstone says, the remedy to recover a pecuniary penalty fixed by statute, is by "action of debt;" and he bases his opinion on the doctrine of implied contracts. 3 Bl. Com. 160, 161, 162, marginal pages. Bacon maintains the same doctrine. Bac. Abr. title Actions qui tam, in notes. Bac. Abr. title Debt, letter A.

In Salmon's case, for practising physic without a license, the exception that debt will not lie to recover the penalty, was overruled. 1 Lord Raymond, 680, (exception 4th.)

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The statutes of jeofails and amendments do not extend to criminal proceedings; but it has been invariably held, that penal actions are within these statutes, and may be amended. 1 Bac. Abr. title, Amendment and Jeofail, A. and C. 2 Str. 1227. 2 Dallas, 143. 1 Gallison, 23.

In cases of acquittal on criminal prosecutions, no new trial can be granted; but new trials may be granted in penal actions. 4 Bl. Com. 361, 362. 1 Durnford & East, 753.

In Malland's case, on an indictment to recover a pecuniary penalty, no method being pointed out or prescribed in the statute, by which it should be recovered, on demurrer it was held, that an indictment would not lie, and that the proper remedy was debt, to be sued for in a court of revenue, and not by indictment. Rex v. Malland, 2 Strange, 828. This doctrine has been fully recognized by the American courts. 7 Pract. Abr. Am. Com.

Law Cases, 289, tit. Penal Statutes, Form of the Action, note, p. 290, citing 1 N. H. Rep. 339. The court held, that where the Legislature did not provide a specific remedy, debt would lie; and in Adams v. Woods, 2 Cranch, 336, Chief Justice Marshall held, that "almost every fine or forfeiture under a penal statute, might be recovered in an action of debt, as well as by information of debt."

Judge Story says: "At common law wherever a penalty is given, and no method of recovery is prescribed by the act, an action or information of debt lies, and not an indictment." He cites in support of this position, 2 Strange, 828, and 2 Cranch, 336. See 2 Gallison, 554. In the case of *The United States* v. Lyman, the same doctrine is again put forth with great clearness. 1 Mason, 498.

In 1838, the doctrine is once more explicitly declared by Judge Story, after a full examination. He says: "The usual remedy in cases of a pecuniary penalty, is an action, or information of debt; an indictment for such a penalty will not lie, unless specially allowed by statute, for it is properly recoverable as a debt in a court of revenue by the government, and is, in no just sense, a criminal proceeding." 3 Summer, 120, 121.

The acts of our own Legislature recognize this doctrine. 1 Moreau's Digest, 371, 388, 402. The act of 1805, ch. 1, § 37, provides, that all indictments shall be found or exhibited within one year after the offence shall have been committed, and that all fines shall be prosecuted for within six months from the time they are incurred; from which, I infer, that fines were not intended by the Legislature to be enforced by indictment; for otherwise, after the prosecution for the fines was prescribed by the lapse of six months, it might be enforced by indictment, during a whole twelve month from the time the offence, by which it was incurred, was committed.

The act approved the 31st January, 1821, denounces a fine of no less than \$200, or imprisonment not exceeding six months, for the killing of certain animals; and a fine of no less than \$100, and imprisonment not exceeding one month, for maining any of them; and the act authorizes a prosecution by indictment in both cases.

The Attorney General has cited 4 Bac. Abr. 498. tit. Indictment, 1 Hawk. Pleas of the Crown, 288, and a case from the State Trials, to show, that an indictment would lie in this case, on the principle that when a new offence is created by an act of Parliament, and a penalty is annexed to it by a separate clause, the prosecutor is not bound to sue for the penalty, but may proceed to indict on the prior clause for a misdemeanor. By referring to 4 Bac. Abr., it will be seen that the authority referred to by Bacon, is the case of *The King v. Harris*, 4 Durn. & East, 202, 206. The great point in that case was, whether the disobedience of an order of the King, made in pursuance of an act of Parliament, was an indictable offence at common law. The court decided that it was not.

To do an act prohibited by statute is a misdemeanor, and punishable as such at common law, by fine and imprisonment. violation of a prohibitory statute is, therefore, indictable as a misdemeanor at common law. If, therefore, a statute prohibits the doing of any act in one clause, and in another and separate clause annexes a penalty, he who violates the statute may be indicted under the prohibitory clause, and punished by fine and imprisonment as for a misdemeanor at common law; for, by the common law, every misdemeanor is so punishable. But if the penalty is sought to be recovered, it can only be recovered by an action of debt, unless otherwise provided specially by the statute; and hence, if the penalty and the prohibition are in one and the same clause, no indictment will lie. Now we have no common law offences in Louisiana. All crimes and offences against our law are created and punishable by statute. If the Legislature merely prohibit the doing any act and annex no punishment to the doing of it, no one is punishable for violating it. We have no punishment at common law, or by common law; consequently, we could not indict or punish a violation of a law which merely forbids, but does not prescribe any punishment for a certain act. This principle explains at once the error of the Attorney General. Having no common law, Williams cannot be indicted and punished under the mere prohibitory clause of the act of 1817, as for a misdemeanor at common law. the penalty is sought to be recovered, it can only be by a civil

suit. An indictment will not lie for it. The case of the King v. Harris, in 4 Durn. & East, 202, 206, and the doctrine in 4 Bac. Abr., tit. Indictment, 498, and in the note, will fully illustrate this.

The Attorney General cited three cases from 23 and 24 Pickering's Reports, to show that, by the common law, a penalty may be recovered by indictment, as the penalty for presuming to sell spirituous liquors without a license in Massachusetts. Rev. Stat. ch. 47, § 1. But the 26th and 27th sections of that law are in these words: "Sect. 26. All the fines imposed in this chapter may be recovered by indictment. Sect. 27. Where any person shall be convicted under the provisions of this chapter, and shall fail to pay the fine awarded against him, he may be imprisoned in the common jail for a term not exceeding ninety days." So that it is only in virtue of a special provision of the statute of Massachusetts, and not by the common law, that those indictments for penalties are allowed. Now we have no such special provisions in the act of 1817, and, therefore, no indictment cau lie.

The Attorney General contends that the jurisprudence of this court has established, that jurisdiction in criminal cases has been denied us by the constitution of the State. The principal case by which he has endeavored to support this proposition, is that of Laverty v. Duplessis, determined in May, 1813. 3 Mart. 42. Laverty, who claimed citizenship of the United States, under a decision of the Supreme Court, in Desbois' case, (2 Mart. 185.) before the establishment of the State judiciary under the constitution, had been discharged upon a habeas corpus, which he had obtained from the Court of the First District against Duplessis, the Marshal of the United States, who had arrested him for the purpose of having him removed as an alien enemy, to a certain distance in the inland part of the State. The Marshal. unwilling to yield up his prisoner on the decision of an inferior court, appealed. The correctness of the opinion of the Superior Court was questioned by many, and it was thought desirable to have the point settled in this court; but public expectation was disappointed. The court avoided looking into Desbois' case, and dismissed the appeal, expressing its unanimous opinion, that it could not exercise any criminal jurisdiction. It is difficult to

comprehend how the assertion of the court's inability to exercise any criminal jurisdiction, led to the conclusion that the appeal ought to be dismissed. Neither in the application of Laverty for the habeas corpus, in the return of the Marshal, in the decision of the District Court, nor in the argument in this, was the least allusion made to any criminal act having been committed. The court took a vain trouble in commenting on its criminal jurisdiction. All they said thereon must be considered as obiter dicta, of no utility in the examination of the question before them, and of no authority in that case or posterior ones. In the case of Chardon v. Guimblotte, 1 La. 423, this court thought that, although Duplessis' appeal could not be dismissed on the ground of the absence of criminal jurisdiction, it might perhaps have been sustained, and the judgment have been reversed on the score of the arrest being on a political matter, and under the authority of the United States.

We have since frequently held, that this court may entertain appeals from decisions on writs of habeas corpus in civil cases. Dodge's case, 6 Mart. 569. Martin v. Ashcraft, 8 Ib. N. S. 314. Chardon v. Guimblotte, 1 La. 421. Hyde et al. v. Jenkins, 6 La. 436. In some of those cases, we declared our want of jurisdiction on writs of habeas corpus in criminal cases. The opinion has proceeded from the consciousness, that the Legislature has made no provision for our exercise of such jurisdiction. Whether this court is susceptible of receiving such a jurisdiction from a provision made by the Legislature for its exercise, is a proposition to which the attention of this court has not yet been directed.

I conclude that, as the obligation of the defendant to pay the fine was merely a civil one, which he might have extinguished by payment, and on which, on his failure to pay, he might have been prosecuted in courts destitute of criminal jurisdiction, the concurrent jurisdiction of such a suit given to the Criminal Court of the First District, has not altered its character; that the fine exceeding the sum of \$300, the State or the defendant were entitled to seek relief in this court by appeal; and that it was not in the power of the Attorney General, by indicting the defendant, instead of instituting a civil suit, to deprive him of the right of appeal. The appeal must, therefore, be sustained.

On the merits, I think with the defendant's counsel, that the proceeding by indictment in the present case is contrary to law; the appropriate remedy being an action of debt, or an information in debt on the statute, or any other civil proceeding for the recovery of money. The judgment ought to be reversed.

BULLARD, J. The Attorney General has moved to dismiss this appeal, on the ground that the case is a criminal one, and that this court is without jurisdiction.

Whatever may have been my opinion originally upon the extent of jurisdiction which the constitution confers upon this court, I consider it unnecessary now to intimate. It is enough that the Legislature have never regulated the exercise of such jurisdiction in criminal cases, and that, at a very early period, this court declined to assume it. Since the decision in the case of Laverty, the question has been considered as at rest; and, for the purpose of this argument, it must be assumed that we are without jurisdiction in criminal cases. Is this case such an one? That is the question, and that is identical with the question to which I shall confine myself, to wit: Does the statute forbidding the introduction into the State of slaves convicted of certain infamous crimes, and denouncing a fine of \$500 and a forfeiture of the slave, in case of contravention, constitute a crime, offence, or misdemeanor, which the Attorney General may prosecute criminaliter, through the intervention of a grand jury? If the violation of that prohibitory law be an indictable offence, there is, we all agree, an end of the case; the appeal is to be dismissed. for want of jurisdiction in this court.

I begin with a definition of a crime or misdemeanor, which will not be questioned—that of Blackstone. "A crime or misdemeanor," says that eminent author, "is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms." "The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this, that private wrongs, or civil injuries, are an infringement or privation of the civil rights

which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity." 4 Black. Comm. 5.

It is hardly necessary to say, that the evil which the statute in question was intended to prevent was a great public evil, and concerned the whole community. The act of knowingly introducing into the State, and mingling with our servile population slaves convicted in other States or countries of murder, rape. manslaughter, arson, burglary, &c., was prohibited as dangerous to the public safety, and is made, in my opinion, not only an offence against the State in general, but is one of very great enormity. It is not to be supposed that in the States from which they might be brought, they are permitted to exist at all, except in penitentiaries or other public prisons; and, therefore, when brought here, it is fair to presume they have been ransomed, and, what is more infamous, ransomed for the sake of gain. Nor would I presume that they have been permitted to be ransomed upon the condition of being transported to another slaveholding State. or indeed to any christian and civilized community. Is there any man of unsophisticated sense who would not exclaim at once, that it is a crime against the State to bring in knowingly and in defiance of a public law, convicted ravishers, murderers, and incendiaries? that it is a matter of which the grand jury, sworn to inquire into all the offences committed within their respective parishes, have a right to take cognizance, and the Attornev General to prosecute by indictment?

Will it be said that a contravention of this statute is punishable only by fine, and therefore not indictable? I answer that I am yet to learn that the character of a law depends upon its sanction, and I cannot understand how the same act, prohibited by a public law, would be an indictable offence if made punishable by imprisonment at hard labor, and would not be so if punishable by fine alone. The sanction of laws, the punishment denounced against those who violate a law forbidding particular acts, are within the discretion of the Legislature; and, if murder were made punishable by fine alone, it would not be less a crime. It

will be said, perhaps, that murder is not merely malum prohibitum, it is malum in se, and therefore essentially and necessarily a crime. By that I suppose is meant, that murder is contrary to the generally received opinions of mankind, and criminal independently of human laws. And is it not essentially immoral knowingly to let loose convicted felons upon a christian community? Can that be said to be a thing harmless in itself, and merely forbidden by positive law? If digging a ditch across a public highway be indictable according to the common law, as we are taught by Blackstone, it is not easy to conceive why the only remedy for the State against a person charged with violating the statute in question, should be by an action of debt in a court of civil jurisdiction. The Supreme Court of Pennsylvania held, that maliciously, wilfully, and wickedly killing a horse, was an indictable offence. Chief Justice McKean, in pronouncing the opinion of the court, says: " It is true, that in the examination of the cases, we have not found the line accurately drawn, but it seems agreed, that whatever amounts to a public wrong may be made the subject of an indictment." 1 Dallas, 338. I admit that this doctrine is one of the common law, which regards every act contra bonos mores as indictable, and that in this State no such mass of undefined offences exists; and it is not left to the courts to say what constitutes a public offence or misdemea-Nothing is punishable here, which is not made an offence, and the punishment denounced by legislative authority; but my idea is, that whatever constitutes an offence against the public by act of the Legislature, may be prosecuted by indictment, unless the Legislature has expressly provided for a different mode of proceeding. Having shown that, according to the principles of the common law, the statute has created an offence against the public, it is clearly the duty of the Attorney General to prosecute in the name of the State. 1 Bul. & Cur. Dig. 26.

The argument that this is essentially a civil case, although the proceeding is by indictment, is ingeniously carried out, and appears at first plausible. Certainly the Attorney General cannot change the nature of the act by the form of proceeding he may choose to adopt. But I am satisfied, that even if an individual informer could maintain an action in his name to recover the Vol. VII.

penalty, the act of contravening the statute would still constitute an offence against the State, which might be prosecuted by indictment or information.

And this brings me to examine the case of Adams v. Woods, 2 Cranch, 336, upon which the counsel for the prisoner has relied. Much stress is laid upon the expression of the Chief Justice, in delivering the opinion of the court in that case, that "almost every fine or forfeiture under a penal statute, may be recovered by an action of debt, as well as by information." I must remark, in relation to that case, that the statute upon which the action was brought, to wit, the act of 1794, to prohibit the carrying on the slave trade from the United States to any foreign place or country, expressly declares, that the penalty should "go, one moiety to the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same." The action brought was by an informer, who demanded one-half of the penalty, and the question before the court was, whether the statute of limitations of 1790, was a bar to the action. clause of the statute which was applicable, is as follows: "Nor shall any person be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years," &c. Now, when the Chief Justice says, that every penalty imposed by such a statute may be prosecuted by action of debt, or information, he meant, undoubtedly, an information on the criminal side of the court—a criminal prosecution, because the statute of limitations in question referred exclusively to the prosecution of criminal proceedings. He says further: "In this particular case the statute which creates the forfeiture, does not prescribe the mode of demanding it; consequently, either debt or information would lie. It would he singular if the one remedy should be barred, and the other left unrestrained." The court consequently held, that the action on the statute was barred by the statute of limitations.

Let me ask whether the statute limiting criminal prosecutions in this State, would not apply to a violation of the statute now in question, in whatever form the penalty may have been sued for, and whether the Attorney General could maintain an action

in a civil form upon the statute, after one year. In the case just cited, it was not decided that a violation of the act of Congress prohibiting the slave trade was not an indictable offence; on the contrary, it was held, that it was so far a criminal offence as to be barred by the general act of limitations of criminal proceedings. The very expression used in the act of Congress implies, I think, that an indictment would lie upon such a penal statute; and by information is evidently meant an information by the public prosecutor, as contradistinguished from an action of debt by an individual informer.

In the case Exparte Marquand, 2 Gallison, 554, Judge Story recognized a technical distinction between fines and penalties. In that case fines had been imposed upon conviction under an indictment under the revenue laws for resisting a custom house officer; and the question was, whether they should be paid over to the collector for distribution. The Judge remarks: "On looking at the language of the act of 1799, it seems difficult to resist the impression, that 'fines,' in the technical sense of the word, as well as penalties, are to be received and distributed by the collector. There are, indeed, but two cases in which, technically speaking, fines are contemplated to be imposed by the act, viz., in cases of obstructing officers of the customs, and of perjury. In all other pecuniary forfeitures within the act, the Legislature seem to have directed, not the process of indictment where a fine may be imposed, but an action or information of debt; for at common law, whenever a penalty is given, and no appropriation or method of recovering is prescribed by the act. an action or information of debt lies, and not an indictment."

I am not in the habit of attaching much importance to the mere phraseology of judges arguendo; but if the language of the learned Judge in the above case has any particular meaning, it must apply to the case now before the court. For under this statute a fine is denounced, and it is appropriated by the act, one-half to the informer, and the other half to the State; but no action is given to an informer, and I should infer that his opinion would be, that an indictment would lie. I do not see how an action of debt could be maintained by the State for the whole fine, when half is given to the informer, nor how an informer

could maintain an action qui tam, which is not expressly given by the statute.

The consequences which might flow from looking upon the fine as a mere debt due to the State, to be recovered by civil action, would be very singular. Suppose a speculator, who may have emptied some State prison of its polluted inmates, should apply to the State Treasurer, and offer to pay him the debt due to the State for bringing in an assortment of felons, and the Treasurer were to require of him \$500 a head, could he not insist upon retaining one-half as informer, and thereby increase the profits of his odious and detestable speculation? And if he were asked where the slaves are, he might reply, that is for the State to ascertain, if they wish to prosecute for a forfeiture of them. Thus they are sold at an enormous profit, and society left to feel the consequences.

The authority of Hawkins appears to me fully to sustain the Attorney General in this prosecution. He lays down the rule to be, that "whenever a statute prohibits a matter of public grievance to the liberties and security of the subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it." As it relates to new offences created by statute, he says: "That where the statute appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of an indictment." And in a note, the doctrine as laid down by Lord Mansfield is condensed into the following pithy sentence, which I believe to be perfectly sound in this State, viz: "When new created offences are only prohibited by the general prohibitory clause of an act of Parliament, an indictment will lie; but when there is a prohibitory particular clause, specifying only particular remedies, then such particular remedies must be pursued." I do not mean to say that an indictment

would lie on a mere prohibition, without denouncing any penalty, or fine, or other punishment; but that whatever may be the sanction of the statute of a public nature, its violation may be prosecuted by indictment. This is more especially the case where no action is given to an informer, and no particular form of proceeding is prescribed.

Much has been said upon what fell from Lord Mansfied in the case of Atcheson v. Everitt, in 1 Cowper, 12. an action of debt upon the statute of George II, against bribery, and the question was, whether a Quaker could testify, or in other words, whether the action was criminal or civil; for if civil, the affirmation of a Quaker could be received, if criminal it could The action was by an individual as informer, claiming the whole penalty under the statute. It was stated in argument that the great question was, whether that was a criminal cause; and that the criterion of distinction was the form of the proceeding, not the offence which occasioned it; and, that the offence of bribery in common with many others, might be prosecuted either by action or indictment. This position was not controverted, and consequently the decision throws no light upon this case. If the Attorney General had proceeded in that case by indictment, and the Court of King's Bench had said that an indictment would not lie, it would have much weight. Mansfield said it is as much a civil action, as an action for money had and received. The Legislature when they excepted the evidence of Quakers in criminal cases, must be understood to mean cases technically criminal. It appears to me clear, that this case only shows the liberal construction given in England to the statute allowing the testimony of Quakers on simple affirmation. It is far from deciding that bribery is not a crime, or that it could not be prosecuted by indictment; and I think it particularly unfortunate in the present case, because this statute does not expressly give an action to an individual prosecutor, as the statute against bribery does.

But the act of 1832, granting certain powers to the Criminal Court of the First District, is relied on. The second section of that act declares, that that court shall have "jurisdiction of all suits and prosecutions on penal statutes, and all suits and prosecutions

instituted on behalf of the State for any violation of a public law, reserving to the parties the right of appeal to the Supreme Court in all cases in which an appeal is allowed by law."

This statute undoubtedly confers civil jurisdiction on the Criminal Court of the First District, in a certain class of cases, to wit, upon bonds and recognizances, and actions upon penal statutes.

The cases are innumerable to which this statute is applicable. It embraces actions upon penal statutes, generally. The inspection laws, the statutes relating to steamboats, to the carrying away of slaves, &c., are full of penal clauses, upon which, actions might be maintained under the act of 1832, in the Criminal Court. I am willing even to admit, that the Attorney General may have sued for the fine, under the statute to prohibit the introduction of convicted felons, precisely as a civil action will lie in England in cases of bribery; but it does not follow that he may not, if he thinks proper, proceed by indictment; and that the violation of the statute is not a crime against the State, which the grand jury may bring to the notice of the court by presentment,

It has been further urged that, as it relates to the forfeiture of the slaves, the proceeding contemplated by the statute is clearly civil, it being in rem; and that, to that extent, the prosecution of Williams is essentially civil, and that the appeal ought to be To this I reply, that the proceeding was by indictment, and was, therefore, a criminal proceeding; and if the court did not pronounce a proper sentence, we can afford no relief. Admitting that, so far as Williams is concerned, the court could only condemn him to pay a fine, and had no authority to pronounce the forfeiture of the slaves, his remedy is not by appeal to this court. If the Judge exceeded his powers, the slaves are still the property of Williams, and he may make good his title. But the whole proceeding was by indictment, and the error in the sentence, if there be one, will not give us jurisdiction to cor-We cannot have a part of it before us, and not the whole.

Upon the whole, I conclude, that the statute creates an indictable offence; that the Attorney General might well proceed in

that form of prosecution; that we are without jurisdiction; and that the appeal ought to be dismissed.

MORPHY, SIMON and GARLAND, Judges, concurred with MARTIN, J.

Same Case—On an Application for a Re-Hearing.

Roselius, Attorney General, for a re-hearing. It is immaterial in the present case, to enter into a discussion of the formerly much vexed question, whether the Supreme Court can constitutionally exercise criminal appellate jurisdiction. The contemporaneous interpretation of the constitution, followed up by an uniform current of decisions of this court during a period of twentynine years, has put this question at rest. Be this, however, as it may, the question does not arise on this occasion. "The Legislature has made no provision for the exercise of such jurisdiction" by this court.

The only question which the case presents is, whether the act of 29th January, 1817, creates a crime or misdemeanor punishable criminally; or whether that law only gives a *penal action* in the proper and legal acceptation of that word.

To come to a correct solution of that question, it is necessary to ascertain what is the legal and proper definition of "a penal action," and on what statutes it lies.

It is strange that this question, which presents itself at the very threshold of the inquiry should not have been discussed either in the elaborate argument of the counsel for the defendant, nor in the opinion delivered by the majority of the court. It is taken for granted, that nothing but a penal action is given by the act of 1817, without a single argument being offered in support of that position. Not one of the "very numerous authorities" cited, gives the slightest countenance to the doctrine here assumed.

What do those authorities establish? Two propositions; first, that penal actions are civil suits; and secondly, that an indictment is not the proper remedy on a penal statute for the recovery

of the penalty, unless that mode of proceeding is pointed out by law. I have never controverted either of these propositions. I have admitted during the whole of this protracted litigation, that penal actions must be considered as civil suits; and I never pretended that a civil suit could be commenced by an indictment. What I contest is, that the law of 1817, under which Williams is prosecuted, gives a penal action, or is a penal statute as contradistinguished from a criminal law.

What is a penal action? It is a suit brought for the recovery of a pecuniary penalty for the commission or omission of an act in violation of a penal statute, in virtue of a special provision in the law authorizing the plaintiff to sue for it. This definition is supported by all the authorities cited, as I shall show hereafter, I contend, therefore, that it is an undeniable proposition, that no penal action, or suit for the recovery of a penalty can be maintained, unless the authority to sue for it, or to recover it, is expressly given by the statute on which the action is founded. other words, the party who brings a penal action, must show his authority to sue by a provision in the law to that effect. that when an act is prohibited under a pecuniary penalty, and no authority given to sue for the penalty in case of contravention, no This distinction runs through all the penal action will lie. It is not a mooted point among common law lawyers. The question debated by them has been in relation to the form of the action to be resorted to, where the right to sue for the recovery of the penalty was given by the statute; and it has long been settled, that "the action of debt" is the proper one.

It is true, that penal actions are based, as the court observes, by Blackstone and other elementary writers, on the doctrine of implied contracts. But neither Blackstone nor any other author says, that a penal action lies for the recovery of a fine imposed as a punishment for the violation of a public law, when the right to sue is not expressly given. The converse of the proposition is supported by all that Blackstone says on the subject. He is discussing the different modes in which obligations are created. In speaking of implied obligations arising from the mere operation of the law, he says:

"The same reason may with equal justice be applied to all

penal statutes, that is, such acts of Parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the direction of the Legislature, and pay the forfeiture incurred to such persons as the law requires. usual application of this forfeiture is either to the party aggrieved. or else to any of the King's subjects in general. Of the former sort is the forfeiture inflicted by the statute of Winchester (enforced and explained by several subsequent statutes) upon the hundred wherein a man is robbed, which is meant to oblige the hundredors to make hue and cry after the felon; for if they take him they stand excused. But otherwise the party robbed is entitled to prosecute them by a special action on the case, for damages equivalent to his loss. And of the same nature is the action given by the statute, 9 Geo. I, c. 22, commonly called the black act, against the inhabitants of any hundred, in order to make satisfaction in damages to all persons who have suffered by the offences enumerated and made felony by that act. more usually these forfeitures created by statute are given at large to any common informer; or in other words, to any such person or persons as will sue for the same: and hence such actions are called popular actions, because they are given to the people in general." By referring to the different statutes here commented on, the court will find, that in every one of them the right to sue for and recover the penalty is given in express terms, either to particular persons, or to common informers in general. In the latter case the King himself may bring the suit: but if one of his subjects has commenced it before him, he cannot maintain it. But Blackstone never dreamt that either the King, or an ordinary individual, could maintain a penal action unless the right to sue was specially given.

This position is fortified by the authority of Bacon in the clearest possible manuer. In the first volume of his Abridgment, page 73, verbo, Actions, qui tam, is the following definition of the action under consideration.

"Actions, qui tam, are such as are given by acts of Parliament which impose a penalty and create a forfeiture for the neglect of some duty, or commission of some crime, to be recovered by ac-Vol. VII.

tion or information, at the suit of him who prosecutes as well in the King's name as in his own. As most penal statutes direct that the penalty may be recovered by action or information, we shall consider both matters together."

And again in a note we read :-

"It is called sometimes a popular action, when the penalty or a part of it, is given to any one who will sue for the same. In these actions or informations, the party who prosecutes has, by commencing his suit, such an interest in the penalty, that the King cannot discharge or suspend the suit, as to the part the plaintiff is entitled to."

Hawkins is equally explicit on this point. He lays down the rule as follows:

"I take it for granted, that they (informations qui tam) lie on no statute which prohibits a thing as being an immediate offence against the public good in general, under a certain penalty, unless the whole or part of such penalty be expressly given to him who will sue for it; because otherwise it goes to the King and nothing can be demanded by the party.

"But where such statute gives any part of such penalty to him who will sue for it by action or information, &c., I take it to be settled at this day, that any one may bring such action or information, and lay his demand tam pro domino rege quam pro seipso."

But if any doubt can exist in relation to this question it will be removed by an attentive examination of the cases cited in the opinion of the court.

The court remarks, that "the counsel for the defendant has urged, that at common law, a penal action or action to recover a penalty is a civil suit." The correctness of this proposition so far as the present controversy is concerned, no one ever disputed. It would have been more to the point to have produced authority to show, that when "a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity" is punished by a fine only, such breach and violation constitutes neither a crime nor a misdemeanor. It is, however, not difficult to account for the absence of authorities to that effect, for no such authorities can

be found. It has never yet been held by any court, that the degree and nature of the punishment to be inflicted for the perpetration of a public wrong, is the criterion, by which it is to be determined whether it is a crime or misdemeanor. will be admitted by all to be a crime, yet by the Saxon law, and by the law of nearly every other nation during the middle ages, the murderer was not otherwise punished than by a pecuniary penalty or fine, which varied according to the rank of the person killed. Were the Legislature of this State to enact, that whosoever shall be guilty of murder, shall be fined in the sum of ten thousand dollars, would this obliterate the crime, and subject the party to a mere penal action? Or, to take one of the lightest misdemeanors, a simple assault, for instance, which is according to the existing law punished by a fine, with or without imprisonment, will any one pretend that for this reason, an assault is not a misdemeanor, and that the party guilty of such an offence cannot be indicted criminally for it? There are many offences enumerated in our criminal code, not punishable in any other way than by a fine. By the first section of the act in relation to lotteries, approved February 17, 1841, every person who shall set up or promote any lottery, &c., shall for every such offence, be punished by a fine of not less than one thousand dollars, and not more than ten thousand dollars, and by imprisonment in the parish jail not less than three months, nor more than one year; and by the second section it is provided, that every person who shall sell either for himself, or for any other person, or shall offer for sale, any lottery ticket, &c., shall be punished for every such offence by a fine not exceeding five thousand dol-The third section subjects those who advertise any lottery ticket for sale, &c., to a punishment for every such offence of a fine of not less than one hundred dollars, and not more than five hundred dollars. According to the fifth section, one-half of the fines specified in the first, second, and third sections, is to be paid to the informer, and the other half to the use of the Charity Hospital of New Orleans; and it is further enacted, that in all prosecutions under this act, the informer shall be a competent witness. It is made the duty of the presiding judge of every court of criminal jurisdiction in this State, specially to charge

every grand jury to inquire into all violations of the laws against lotteries, and against the unlawful selling of tickets in lotteries. Three distinct offences are created by this law: but they are all punished differently; the first by a heavy fine and severe imprisonment; the two last by a pecuniary penalty only. Not a word is said in the law in relation to the mode of prosecution. Now I would ask, whether a violation of the first section of this act alone exposes the offender to be indicted criminally? And whether a penal action is to be instituted for the recovery of the fine for the violation of the second and third sections? answers to these two questions be in the affirmative, why are the presiding judges of the courts of criminal jurisdiction and the grand juries throughout the State specially charged to see that the different sections are not violated? What then becomes of the argument, that the act on which the prosecution against Williams is founded is purely penal; nothing is inflicted by it but a pecuniary penalty or fine ;-no imprisonment, no punishment:—nothing but a definite, fixed, pecuniary penalty? The Legislature has certainly expressed a different opinion on the subject of punishment. In all the sections of the law relative to lotteries, the word punishment is used with reference to the paviment of a fine. There are few, if any persons who would not consider the payment of a heavy fine as a severe punishment. Indeed the words penalty and punishment are synonymous. is a gross error to suppose, that all pecuniary penalties can be recovered by a penal action, even under the common law. such action can be maintained unless specially given by the statute.

It is said, that "we have no punishments at common law, or by common law; consequently we could not indict or punish a violation of a law which merely forbids, but does not prescribe any punishment for a certain act. This principle explains at once the error of the Attorney General. Having no common law, Williams cannot be indicted and punished under a prohibitory clause of the act of 1817, as for a misdemeanor. The case of The King v. Harris, 4 Durn. & East, 202, 206, and the doctrine in Bacon's Abr. title, Indictment, p. 498, and in the note, will fully illustrate this."

It is true, crimes and misdemeanors in this State are created by statute; and therefore, it is not sufficient to prohibit an act without denouncing the punishment which is to be inflicted for its At common law, all misdemeanors are punishable with fine and imprisonment at the discretion of the court; and all new offences are considered as misdemeanors unless they are declared to be felonies. The courts in the exercise of the discretionary power vested in them, sometimes punish by fine alone, and at others couple both modes of punishment together, according to the nature of the offence. Hence in England and in the common law States, a prohibitory clause is all that is required to create a new crime or misdemeanor; and when it is found necessary in order to enforce obedience, to annex a pecuniary penalty for the benefit of the person more immediately injured by the commission of the offence, or in favor of a common informer with a view of provoking the prosecution of offenders, the common law punishment of fine and imprisonment, at the discretion of the court, and the penalty to be recovered by action of debt, are considered cumulative: the latter is an additional sanction of the law superadded to the former. But although both punishments may be inflicted, it is not done in the same prosecution. The common punishment follows the prosecution and conviction on an indictment or criminal information; the pecuniary penalty is recovered by a penal action, brought by the party to whom the right of suing is given by the statute. In some cases, however, the right to sue for the penalty is not given by the law creating the offence, and then the common law punishment is superseded by that provided in the statute, no matter whether it consist in a fine or imprisonment, or both, nor whether the prosecution be by indictment, or criminal information. With us it is different: and having no common law, crimes and misdemeanors can only be punished in conformity to the statutes applicable to them. We have no cumulation of punishment. For this reason there are but few penal actions, or actions on penal statutes given by our law. The distinction between criminal laws and penal statutes, is clearly marked in the legislation of this State. law in relation to lotteries affords a striking instance of this. By the three first sections, the promotion of lotteries, the selling of

lottery tickets, and the advertising of lotteries, &c., are severally punished criminally; but the fourth section gives a penal action to the government; it is in the following words:

"Sect. 4. That every grant, bargain, sale, conveyance, or transfer, of any real estate, or of any personal property, which shall hereafter be made in pursuance of any lottery not authorized by the laws of this State, or for the purpose of aiding or assisting in such lottery, are hereby declared void and of no effect; and that all sums of money, and every other valuable thing drawn as a prize, or as a share of a prize in any lottery, by any person contrary to the provisions of this act, shall be forfeited to the use of the State of Louisiana, and may be recovered by an information to be filed, or by a civil action to be brought by the Attorney General, or any District Attorney in the name and in behalf of the State."

Here we have the most conclusive evidence that whenever the Legislature intend to give an action on a penal statute, they do so in express terms.

Having no common law offences, no act can be punished except in pursuance of a special law. But let us inquire how the legislative will has been expressed on this subject? By reference to the different criminal laws in our statute book, it will be found, that the language used in nearly all, is similar to that of the act of 1817. The 8th section of the "act for the punishment of crimes and misdemeanors" is as follows: "Every person convicted of horse or mule stealing, or for stealing any slave, shall for every such offence, be publicly whipped, and shall suffer imprisonment at hard labor, not less than seven, and not more than fourteen years." Similar phraseology is used with regard to almost all the other crimes and misdemeanors punishable in this State. Generally, the act is not even prohibited in express words; the penalty or punishment alone is denounced. In this way all crimes and misdemeanors have been created by our law. Is the language of the act of 1817 different? The first branch of the section provides, "that no slaves shall be imported and brought into this State, who shall have been convicted of the crimes of murder, rape, arson, manslaughter, attempt to murder, burglary, or having raised or attempted to raise an insurrection among the slaves in any State of the Union or elsewhere."

The concluding part of the section contains the punishment to be inflicted for the violation of the law. It is as follows: "And if any such should be, they shall on conviction thereof be seized and sold, for cash, to the highest bidder, after fifteen days notice of time and place of sale, one-half of the purchase money to be applied to the use of the State, and the other half to the informer; and every person who shall import or bring into this State such slaves knowing that they have been convicted of any of the above mentioned crimes, shall upon conviction before any court of competent jurisdiction, be fined for each and every slave, in the sum of five hundred dollars, one-half to be applied to the use of the State, and the other half to the use of the informer." By comparing the phraseology of these two statutes, we discover the greatest similarity except in the kind of punishment inflicted. No authority is given in the act of 1817, either to the State, or to a common informer, to sue for the recovery of the fine or forfeiture. But it may be said that the informer can sue for it, because he has an interest, being entitled to one-half. The answer is, that no penal action, or action qui tam, can be maintained on the statute because of the absence of any provision directing the recovery of the penalty or forfeiture by suit; and that the word informer in the law, means an informer in a criminal prosecution, who gives information to the proper officers of the commission of the offence. The fine and forfeiture are the consequences of and follow the conviction; and are to be applied after the conviction, "one-half to the use of the State, and the other half to the use of the informer." On such a statute no action or information of debt, or any other form of civil action has ever been instituted.

The objection that the statute under which Williams is prosecuted, does not expressly direct that the proceeding shall be by indictment, is futile. Is this direction found in relation to any other offence punished by our laws? It is to be found in a single case only. The act approved the 31st January, 1821, relative to the maliciously killing, or wounding of certain animals, authorizes a proceeding by indictment; and that law is triumphantly invoked to prove, that no offence can be prosecuted in this manner unless the statute expressly authorize it. If this be so, out

of upwards of eighty crimes and misdemeanors, only one can be prosecuted criminally! Such is not the legitimate and fair deduction to be drawn from the provisions of that law. Suppose it had been silent in regard to the manner in which the offences should be prosecuted, could there be a serious question whether an indictment would lie? How are all crimes and misdemeanors to be prosecuted in this State? That question is answered by the constitution, article 6, section 18.

"In all criminal prosecutions the accused shall have the right of being heard by himself or counsel, of demanding the nature and cause of the accusation against him, of meeting the witnesses face to face, of having compulsory process for obtaining witnesses in his favor, and prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; nor shall he be compelled to give evidence against himself."

It might perhaps be doubted under this provision of the constitution, whether a person accused of an offence could be prosecuted, in this State, in any other way than by indictment or information. At all events, when the law directs no other mode of proceeding, where is the public officer, sworn to support the constitution, who would dare to adopt a different method of prosecution.

Though the English and other common law authorities are not binding on us in this State in questions of this kind, I will examine the decided cases and authors referred to.

The first case cited in the opinion of the majority of the court is from 1 Lord Raymond, 682, The President and College of Physicians v. Salmon. The plaintiffs by the name of the President and College or commonalty, &c., brought an action of debt against the defendant for five pounds per month, for having practised physic without license. Among other questions raised



^{*} In the original manuscripts of the constitution, the word in occurs between the words "and" and "prosecutions;" so that this article of the constitution reads—"the accused shall have the right, &c., of having compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial," &c. The argument of the Attorney General, appears to be based on this erroneous reading. The restitution of the word in shows that this article has been misapprehended.—Reporter.

in argument, it was contended, "that debt will not lie, it not being given by the statute, but an information at the suit of the King. Debt is given by 25 Car. 2, c. 2, for the penalties for not having taken the oaths, and usually in all penal statutes. To which it was answered, that when a certain penalty is given by statute, the person to whom &c., shall have debt by construction And the case upon 2 and 3 Edward VI. c. 13, of tithes is a strong case, the treble value sounding in damages, and not being given in certain to any person by the words of the statute. And the case in Cro. Car. 256, is as the present case is, which was agreed by the court." It is very clear, that the point here in controversy between the parties was in relation to the form of the action. The right to sue was given in express words to the plaintiffs. It was objected, that the action of debt was not the proper one under the special statute, and that the payment of the penalty should be enforced by an information at the suit of the King. The information spoken of is evidently one of debt, and not a criminal prosecution. The court decided, that when the right to sue for the recovery of the penalty is given by the law, the party can bring the action in his own name; and that the action of debt was correct. The language of Chief Justice Holt is too plain to admit of a doubt. He said "that the case of debt for tithes upon the statute of Edward VI. was at first a strain because it gave an action of debt, whereas the statute gave but treble damages; but the party should rather have had an action upon the statute." The idea that an action of debt or any other action could be maintained on a statute which did not authorize the plaintiff to sue, never presented itself to the mind either of the court or counsel. It cannot be denied then that this case supports, and indeed, fully recognizes the rule for which I contend.

The next case relied on is that of The Attorney General v. John Bowman, coram Eyre, C. B. 16th January, 1791. "Upon the trial of an information against the defendant for keeping false weights, and for offering to corrupt an officer, the defendant's counsel called a witness to character. The question was, whether the testimony was admissible or not. The court ruled that it was not, on the ground that it was a civil suit brought in pursu-Vol. VII.

ance of the statute for the recovery of the penalty, and 'not a prosecution directly for the crime.' The pecuniary penalty in this instance, is superadded to the common law punishment of But the right to sue for the penalty is given by the statute." The Chief Baron says: "I cannot admit this evidence in a civil suit. The offence imputed by the information is not in the shape of a crime. It would be contrary to the true line distinction to admit it, which is this, that in a direct prosecution for a crime, such evidence is admissible; but where the prosecution is not directly for the crime, but for the penalty, as is in this information, it is not. If evidence of character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the Excise and Custom House Laws." It is too plain to be disputed, that the information filed by the Attorney General against Bowman, was an information of debt, in which the penalty was sought to be recovered, in virtue of a special provision of the statute. It is well known, that nearly all suits in the name of the King are brought by information. suppose that the right to bring a civil suit for the recovery of the penalty is recognized in this case, in the absence of a special provision in the law to that effect, is an egregious mistake.

The case of Atcheson v. Everitt, 1 Cowper, 382, was an action of debt upon the statute, 2 George II., c. 24, sect. 7, against That section provides: "That if any person who shall have or claim to have any right to vote in any election of any member in Parliament, shall ask, receive, or take any money or other reward, by way of gift, loan, or other devise, or agree or contract for any money, gift, office, employment or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote in any such election; or if any person by himself or any person employed by him, shall by gift or reward, or by any promise, agreement, or security, for any gift or reward, corrupt or procure any person or persons to give his or their vote or votes in any such election, such person so offending in any of the cases aforesaid, shall for every such offence forfeit five hundred pounds: and such offender after judgment against him in any action, or information, or summary action, or prosecution, or being otherwise lawfully convicted thereof, shall forever be disabled to vote

in any election of any member of Parliament, and to hold any office or franchise, as if such person was naturally dead." 1 Russel on Crimes, 156, et seq. The right to bring an action and to obtain a judgment for the penalty, is given by the statute in express words. But besides the penal action, the party guilty of bribery is subject to be prosecuted criminally. The same author, from whose excellent work on criminal law I have copied the statute of 2 Geo. II. c. 24, § 7, says: "It has been holden that notwithstanding this statute, bribery in elections of members to serve in Parliament still remains a crime at common law; that the Legislature never meant to take away the common law crime, but to add a penal action; and that this appears by the words of the statute—or being otherwise lawfully convicted thereof." I cannot conceive how a question could arise as to the character of the suit brought by Atcheson. It was founded on the express authority of the statute, and its object was to recover the penalty which the defendant was liable to pay independently of the criminal punishment. The payment of the penalty could be no protection against a criminal prosecution; and Lord Mansfield very correctly observed, that "it was as much a civil action as an action for money had and received." But his lordship no where says that a civil action can be maintained on a statute which does not authorize a suit to be instituted for the recovery of the penalty.

It was idle to cite authorities to prove, "that the statutes of jeofails and amendments do not extend to criminal proceedings, but that it has been invariably held that penal actions are within those statutes, and may be amended." Nor was it necessary to refer to adjudged cases for the purpose of showing, "that in criminal prosecutions no new trial can be granted in case of acquittal; and that the rule is different in penal actions." All this is beyond a doubt, and has never been disputed.

I come to the case of *Dominus Rex* v. *Malland*, from 2 Strange, 828, which is relied on by the counsel for the defendant, and cited in the opinion of the court. With reference to this case the court observes.

"In Malland's case, an indictment to recover a pecuniary penalty, no method being pointed out or prescribed in the statute by

which it should be recovered, on demurrer it was held, that an indictment would not lie, and that the proper remedy was debt to be sued for in the court of revenue and not by indictment."

This is not a correct statement of the case. It is true, the objection urged by the counsel for the defendant was, "that there is no appropriation of the penalty, nor any method prescribed in which it shall be recovered, though there is as to all the rest." But the reporter informs us, that "upon looking into the act, it appeared this offence was omitted out of the clause which gave the Bricklayers Company power to sue for the penalties, and therefore the court held, that the twenty shillings per thousand was in the nature of a debt to the crown, where the unappropriated penalty would go, and was suable for in a court of revenue, and not by indictment." It appears that the statute 12 Geo. I. c. 35, imposed several penalties with a view of regulating the burning of bricks. All the penalties were for the benefit of the Bricklayers Company for whose encouragement the law was evidently passed, and express power is given to it to sue for the penalties. This then was a penal statute as contradistinguished from a criminal one —the right to sue for the penalties being expressly given; but the penalty of twenty shillings per thousand for burning place bricks and stock bricks together, was (probably through inadvertency.) omitted in that clause of the act which gave the Bricklayers Company power to sue, and the question was, whether this omission was to change the otherwise undoubted character of the statute under consideration. The court decided that it did not; and that all the unappropriated penalties went to the crown. Besides the burning of place bricks and stock bricks together was not a public wrong, for which reason it might be well doubted whether it could be the subject of an indictment without an express provision to that effect. However that may be, it certainly does not establish the position in support of which it is invoked.

The cases collected in the 7th volume of the Practical Abridgment of American Common Law Cases recognize the rule, which I never disputed, that when the right to sue is given, without indicating the specific action or remedy, "debt will lie."

In citing the case of Adams v. Woods, 2 Cranch, 336, it is said that Chief Justice Marshall held, "that almost every fine or for-

feiture under a penal statute, might be recovered in an action of debt, as well as by information of debt." By referring to the case it will be discovered, that the Chief Justice never said any such thing. The case of Adams v. Woods was founded on a penal statute in the true acceptation of that word, the act of Congress passed on the 22d March, 1794, "to prohibit the carrying on the slave trade from the United States to any foreign place or country;" (1 Story's Laws U. S. 319;) the second section of which provides:

"That all and every person building, fitting out, equipping, loading or otherwise preparing or sending away any ship or vessel, knowing or intending that the same shall be employed in the slave trade, contrary to the true intent and meaning of the act, or any ways aiding or abetting therein, shall severally forfeit and pay the sum of \$2000; one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same."

To this action the defendant pleaded the prescription of two years, founded upon the 31st section of the act of Congress entitled, "an act for the punishment of certain crimes against the United States," passed 30th April, 1790. 1 Story's Laws U. S. 83. On behalf of the plaintiff it was contended, that the limitation only applied to criminal prosecutions; and did not extend to suits for penalties. The case of *Atcheson v. Everitt, and other authorities were cited in support of this distinction. In arguing this point the Chief Justice says:

"The words of the act are, 'nor shall any person be prosecuted,' &c. It is contended, that the prosecutions limited by this law are those only which are carried on in the form of an *indictment or information*, and not those where the penalty is demanded by an action of debt."

Now what does the Chief Justice mean by the word information in the above paragraph? Can any one seriously contend that he means "an information of debt?" It is too clear to admit of a doubt, that he uses the words "indictment or information," as methods of criminal prosecution in contradistinction to a civil suit by action of debt. The same words are again used in the next paragraph:

"But if the words of the act be examined, they will be found

to apply not to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offence. It is not declared that no indictment shall be found, or information filed, for any offence not capital, or for any fine or forfeiture under any penal statute, unless the same be instituted within two years after the commission of the offence. In that case the act would be pleadable only in bar of the particular action. But it is declared, that 'no person shall be prosecuted, tried or punished'—words which show an intention not to limit any particular form of action, but to limit any prosecution whatever."

The Chief Justice is evidently using the word in the same acceptation when he says subsequently: "almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information; and to declare that the information was barred while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the Legislature, which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable, would be to overrule express words, and to give the statute almost the same construction which it would receive if one distinct member of the sentence was expunged from it. In this particular case, the statute which enacts the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie. It would be singular if one remedy should be barred and the other left unrestrained."

So Chief Justice Marshall was of opinion, that when the statute which creates the forfeiture does not prescribe the mode of demanding it, a criminal information is the proper remedy, which is quite a different thing from what he is made to say, "that the penalty may be recovered by an action of debt as well as by an information of debt." And no one will deny, that if I could have filed an ex officio criminal information against Williams, I could, a fortiori, submit an indictment against him to the grand jury. The latter mode of prosecution is always more satisfactory, and affords additional protection to the accused.

Let it not be supposed, however, that I claim for the Attorney General the power of converting a civil case into a criminal prosecution by the mode of proceeding to which resort is had. I

contend, that no penal action is maintainable on a statute prohibiting a public wrong, unless the right to sue for the penalty is given by the law itself. The act of Congress and its exposition by the Chief Justice of the United States, affords an additional illustration of the correctness of that position.

What possible bearing the case of The United States v. Lyman, (1 Mason, 481,) can have on the question under discussion, I am at a loss to conceive. That was an action of debt brought by the United States against the defendant for \$17,242 40, being the amount of duties due on five hundred chests of tea imported into the port of Boston, in the ship Alert, in July, 1816. Plea Nil debet. The only question was, whether a personal action for the duties would lie against the importer of the tea, or whether the government ought to have proceeded in rem. Judge Story decided, that the obligation is a personal one, and that the proper remedy for the enforcement of such obligations is by action of debt. He says: "It has been repeatedly settled, both here and in England, that under such circumstances, the duties are a debt accruing to the government from the time of the actual importation." Did any one ever suppose that a suit for the payment of duties was a penal action? No doubt by the common law, as Judge Story observes, "an action of debt is the general remedy for the recovery of all sums certain, whether the legal liability arise from a contract or be created by a statute. And the remedy as well lies for the government itself, as for a citizen. And where the debt arises by statute, an action or information of debt is the appropriate remedy, unless a different remedy be prescribed by the statute." Here the learned Judge lays down the elementary principle that no matter how the obligation to pay a sum certain is created, the remedy is the same, unless a different one be prescribed.

The last of the "very numerous authorities cited," is the case of Matthews v. Offley, 3 Sumner's Reports, 120, et seq. The Vice-Consul of the United States instituted that suit against the defendant, who was master of the ship Gem, to recover the penalty of one hundred dollars, prescribed by the act concerning consuls &c., of the 2Sth February, 1803, for the refusal to take a destitute seaman of the United States on board of his vessel at the port of Smyrna. The 4th section of that law enacts, that the pen-

alty shall be sued for and recovered for the benefit of the United States, in any court of the United States. But nothing is said in the act as to the person by whom, or the mode in which, this penalty shall be sued for or recovered. That a penal action could be maintained on that statute no one could deny. right to sue for and recover the penalty is expressly given. The only difficulty was in relation to the person by whom the sui should be brought, and the form of action which was to be adopted. And Judge Story decided, "that upon general principles, where a pecuniary penalty or forfeiture is inflicted for any public offence or wrong, it seems clear, that the action to recover the penalty or forfeiture must be brought in the name of the government, and not in the name of any private party, unless some other mode for the recovery is prescribed by some statute; and the usual remedy in cases of a pecuniary penalty is an action or information of debt by the government itself." This is a mere repetition of the doctrine recognized in all the other cases. It is too plain to require argument, that when the whole penalty is to be recovered for the benefit of the government, the suit must be instituted in its name, unless some person is specially authorized to sue for its use and And how could it be questioned that an action of debt was the proper remedy? But suppose the law of Congress had enacted, that every master of a ship or vessel belonging to citizens of the United States who shall refuse to receive destitute seamen when required so to do by the consul, &c., shall on conviction thereof before any court of competent jurisdiction, be fined for each and every such offence in the sum of one hundred dollars, would Judge Story have said one word about an action of debt?

Does any one of the cases cited establish the position assumed, that a penal action ought to have been brought against Williams under the law of 1817? Most assuredly not. On the contrary, the doctrine for which I contend is recognized and illustrated in all of them. There is no penal action unless the right to sue for and recover the penalty be given by the statute.

The acts of our own Legislature are next invoked for the purpose of proving that Williams should not have been indicted. The first volume of Moreau's Digest is referred to, at pages 371, 338, 402. The pages referred to are filled with provisions rela-

tive to crimes and misdemeanors punishable criminally by fine or imprisonment, or both, at the discretion of the court. No one has ever pretended, that any of the offences there enumerated could be prosecuted in any other mode than by indictment or information.

The 37th section of the act of 1805 is cited to show, that it was not the intention of the Legislature that the payment of fines and forfeitures should be enforced by indictment. But a different construction has been given to that section ever since its en-The obvious intention of the law-maker was to limit actment. criminal prosecutions. It was considered, that the prescription of minor offences punishable by fine and forfeiture only, ought to be shorter than that of those of a graver character; and as regards the crimes of wilful murder, arson, robbery, forgery, and counterfeiting, no limitation is established. To infer from this. that crimes and misdemeanors for the commission of which a fine only is inflicted, cannot be prosecuted criminally, is illogical. The very title of the act is indicative of a different intention. title is: "An act for the punishment of crimes and misdemeanors." The fallacy of the argument, however, results beyond the possibility of a doubt from the enacting clauses of the law itself. The 7th section provides, that "If any person or persons shall be accessory after the fact, to any wilful murder, rape, arson, robbery or burglary, he, she, or they so offending, shall, upon conviction thereof, be fined not exceeding five hundred dollars, or receive not exceeding thirty-nine lashes on the bare back."

By a subsequent law the punishment of whipping has been abolished as regards free persons; consequently the only punishment that can be inflicted for the offences enumerated in the section, is a fine not exceeding five hundred dollars. Yet would it not be absurd to say, that those crimes can, for that reason, not be prosecuted criminally? The 11th section of the same law punishes misprision of felony by fine not exceeding three hundred dollars. Can this offence not be prosecuted criminally? The 30th and 32d sections likewise impose a fine for the misdemeanors therein set forth; and to make assurance doubly sure, the 33d section declares, that all "the crimes, offences and misdemeanors Vol. VII.

herein before named, shall be taken, intended and construed according to and in conformity with the common law of England; and the forms of indictment, (divested however of unnecessary prolixity,) the method of trial, the rules of evidence, and all other proceedings whatever in the prosecution of said crimes, offences and misdemeanors, changing what ought to be changed, shall be, except as is by this act otherwise provided for, according to the said common law."

All crimes are not prosecuted by indictment, for the act of the 8th of March, 1841, provides, "that in all criminal prosecutions in the Criminal Court of the First District, for crimes and offences punishable by not more than two years hard labor, the proceedings may be by information." There can be no dispute as to the meaning of the word "information" here. It is an exofficio criminal information filed by the Attorney, in the name and by the authority of the State. Nor will it be asserted that larceny is no longer a crime, because "an indictment or presentment" need not now be found or exhibited against the thief, in the language of the 37th section of the act of 1805. The prosecution spoken of in that section means a criminal prosecution: and not an action of debt on a penal statute. There is no statute in the whole chapter on which a penal action could be instituted.

There are some, though not many laws, to be found in our statute book on which penal actions can be maintained. When the right to sue for and recover the penalty is given, neither an indictment nor a criminal information is the proper remedy. The fine imposed on an assessor for neglect of duty, is cited as an instance of a penal statute on which no indictment or information could be maintained. But the reason of this is obvious. The statute directs the District Attorney to sue for the payment of the fine. The case of pedlars and hawkers who neglect to obtain a license, or to exhibit it when required, is to be prosecuted criminally, and not by action or information of debt, as the court seems to suppose. See the 4th section of the act of 22d February, 1820.

As these offences are punished by both fine and imprisonment,

it will hardly be insisted that an information of debt will lie for them.

But it is urged, that "the laws in relation to the inspection of tobacco, flour and other articles, furnish us with many cases where it is not necessary to indict the party to subject him to the fine or penalty." An examination of those statutes will show, that the right to sue for the recovery of the penalties is expressly given in all of them. See the 9th section of the act regulating the inspection of flour, beef, and pork, approved May 3d, 1805.

The argument founded on the "Bank Law," by which the corporation and directors are subjected to certain fines and forfeitures for buying, selling, bartering or trading for cotton, sugar, or any other produce, &c., is answered in the same manner. The 15th section of that law enacts:

"That all fines and penalties under this act, shall be sued for, as before provided, and all sums recovered shall be paid over by the Attorney General, less ten per cent for his own services, to the President of the Charity Hospital of New Orleans, for the use of said hospital."

There is not a single statute in this, or in any other State of the Union, nor in England, on which a penal action is maintainable when the power to sue for and recover the penalty is not given. The different laws referred to in the opinions delivered by the majority of the court, all of which I have noticed, afford the most decisive proof of this assertion. In every instance the right to sue for and recover the penalty is given in express words. It has already been shown, that the act of 1817 contains no provision of that kind. On the contrary, the language in which it is expressed excludes the idea of any suit. There is to be a prosecution and a conviction; and the fine and forfeiture of the slaves constitute the sanction of the law.

It is said that the obligation of the defendant to pay the fine, is merely a civil one, which he might have extinguished by payment. This would probably be correct, if the statute on which the prosecution is based had authorized the institution of a suit.

It is just as unreasonable to say, that the fine imposed by the law of 1817 is a debt and may be extinguished by payment before prosecution and conviction, as it would be for the forger or robber to pre-

sent himself to the warden of the penitentiary, and offer to undergo the punishment prescribed by law for the crime of which he had been guilty, without being either prosecuted or convicted. the keeper of the penitentiary was to admit an individual under such circumstances, the prisoner could, of course, obtain his release at any time by a habeas corpus. And if the Treasurer, or any other officer of the State, were to receive a fine to be inflicted on the conviction of an offence, before the offender had been prosecuted and convicted, can it be doubted, that the party would have the right to compel the officer to refund the amount on the ground that no debt existed when the money was paid? The debt arises from the conviction. And it would be no defence for the Treasurer to say that the party admitted his guilt. If it is a mere civil debt, why, in case of non-payment, on conviction, is the offender to be imprisoned for a period not exceeding one year. See the 10th section of the act of 1818. 1 Bullard & Curry's Digest, 260. The punishment of imprisonment is substituted for the fine when the accused is unable or unwilling to pay it; and yet we are gravely told that it is a mere civil obligation to be enforced by a civil suit.

That the importation into this State of slaves convicted of the felonies enumerated in the act of 1817, is a serious public wrong, is not denied. Now this "matter of public grievance to the liberties and security of the citizens," is prohibited by the law under which Williams was indicted; and a punishment is annexed for the violation of its provisions. The court has observed, that "if the Legislature merely prohibits the doing of an act, and annexes no punishment to the doing of it, no one is punishable for violating it." I would ask whether this is not "a negative pregnant with an affirmative?" I conclude that, according to the course of reasoning adopted by the majority of the court, the statute creates a crime or misdemeanor.

I have never contended, "that an indictment would lie in this case on the principle that when a new offence is created by an act of Parliament, and a penalty is annexed to it by a separate clause, the prosecutor is not bound to sue for the penalty, but may proceed to indict on the prior clause for a misdemeanor." I observed incidentally, that according to the authorities cited, an

indictment may lie on the prohibitory clause of even a penal statute expressly authorizing the institution of a suit for the recovery of the penalty; but not that such was the law in this State. What I insisted upon was, that the rule as laid down by Hawkins was the correct one. He says:

"Also it seems to be a good general ground, that whenever a statute prohibits a matter of public grievance to the liberties and security of the subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method-of proceeding do manifestly appear to be excluded by it."

"Also where a statute makes a new offence, which was in no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment or action of debt, or information, &c., without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seem impliedly to exclude that of indictment. Yet it hath been adjudged, that if such statute give a recovery by action of debt, bill, plaint, information, or otherwise, it authorizes a proceeding by way of indictment. Also where a statute adds a further penalty to an offence prohibited by the common law, there can be no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law."

R. Hunt and Grymes, contra. The counsel for the State declares, that the authorities cited by the court only establish two principles, which he has always admitted. "1st. That penal actions, are civil suits; and 2d. that an indictment is not the proper remedy on a penal statute for the recovery of the penalty, unless that mode of proceeding is pointed out by law." Now, the authorities were cited by the court, to sustain the doctrine laid down by Judge Martin in his opinion: "That at common law, a penal action or action to recover a penalty, is a civil suit. The usual remedy in cases of a pecuniary penalty, is an action or information of debt. An indictment will not lie for such a penalty, unless specially allowed by statute; for, it is properly recoverable

as a debt; and is in no just sense, a criminal proceeding." The Attorney General therefore, clearly admits the soundness of the conclusions of the court thus far. But he says, "there has not been a single argument offered by the majority of the court, to show that in this case, the action should be a civil one;" and he asserts, that "it is taken for granted, that nothing but a penal action is given by the act of 1817, without a single argument being offered in support of that position."

Is this so? The act of 1817 subjects any person who shall bring certain slaves into this State, to a penalty of \$500, for each and every such slave, &c. It provides no corporal or other punishment for the violation of this provision, but affixes merely a pecuniary mulct or penalty to the transgression of the law. "The statute upon which this prosecution was based," says Judge Martin in his opinion, "is purely penal. Nothing is inflicted by it but a pecuniary penalty, or fine:-no imprisonment-no punishment:-nothing but a certain, definite, fixed pecuniary penalty." Having thus decided, that the statute of 1817 is purely penal, and provides merely a pecuniary mulct or penalty for its violation; that according to the Attorney General's own admission, "an indictment will not lie for such a penalty, unless specially allowed by statute;" and perceiving that no such allowance is made in the act of 1817, or any other statute of this State; the court concluded, that an indictment would not lie for the recovery of the penalty under the act of 1817. Again, the Attorney General admits that this court has correctly determined, that an action to recover a penalty is a civil action. The court has further determined, that under the act of 1817, a pecuniary penalty alone can be recovered: surely it necessarily follows, that the action to recover the penalty must be a civil action; and yet the Attorney General says, "it is taken for granted, that nothing but a penal action is given by the act of 1917, without a single argument being offered in support of that position." And here in truth the whole case ends. The proceedings against Williams were, from beginning to end, criminal proceedings, informal, erroneous and illegal.

But the Attorney General says: "I contend that it is an undeniable proposition that no penal action, or suit for the recovery

of a penalty can be maintained, unless the authority to sue for it, or to recover it, is expressly given by the statute on which the action is founded. In other words, the party who brings a penal action must show his authority to sue, by a provision in the law to that effect," &c. The whole argument of the Attorney General goes only to this extent, that a penal action will not lie, unless express authority is given to sue, totidem verbis. Supposing this to be true, it would not follow that an indictment or criminal action would lie for the recovery of the penalty. Indeed the Attorney General in the opening of his argument, admits that it would not lie; and, therefore, his proposition, if correct, would not prove his proceedings in this case to be legal.

But the proposition of the Attorney General is not supported by any authority, and is erroneous. His error consists in the notion, that a qui tam action is the only mode of recovering a penalty civiliter. A few words will dissipate the error.

Wherever a statute prohibits a thing, as being an immediate offence against the public good in general, under a certain penalty; the statute is a penal statute.

Wherever a part or the whole of the penalty is given to him who will sue for it, any person may bring such action or suit and lay his demand, (according to the common law, tam pro domino rege, quam pro seipso;) and this action is a qui tam action. "But without such penalty or part of it be given, no person can sue; (2 And. 127. 2 Jones, 234. 2 Hawk. P. C. 377;) for the whole penalty goes to the King. 2 East, 569. 3 Bos. & Pul. 382. 5 East, 313. It hath been determined however, that where an informer, entitled to no part of the penalty, sues for the King and himself, the information is not void, but the whole shall be adjudged to the King. Parker, 105. Hardr. 185." Bac. Abr. Tit. Actions qui tam, (A) in notes.

Admitting that no ordinary individual can sue to recover a penalty by a penal action, unless the statute creating the penalty authorizes him to do so; it is equally clear, that where a statute prohibits a thing under a certain pecuniary penalty, without making any appropriation of the penalty, the unappropriated penalty goes to the Crown in England, or to the State in this coun-

try; and if nothing is said as to the recovery, it must be sued for in a court of revenue, and not by indictment.

This is fully supported by the authorities relied on in the opinion of the court. For instance, take the case of *Dominus Rex* v. *Malland*. The report of that case in 2 Strange, 828, is in these words:

"Indictment on the statute of the late King, 12 Geo. I. c. 35, for burning place bricks and stock bricks together. And on demurrer, it was objected by Mr. Fazekerly, that in this particular instance, though a penalty of 20s. per thousand was given, yet there is no appropriation of it, or any method proscribed in which it shall be recovered, though there is, as to all the rest. And in looking into the act, it appeared this offence was omitted out of the clause which gave the Bricklayers Company power to sue for the penalties; and therefore the court held, that the 20s. per thousand was in the nature of a debt to the Crown, where the unappropriated penalty would go, and was suable for in a court of revenue, and not by indictment. Though Strange cited 1 Mod. 34, 1 Vent. 63, and insisted that the 20s. ought to be the measure of the fine upon the indictment. Judicium pro def."

Here there was a penalty prescribed by a statute; there was no express power or authority to sue given to any person or corparation; being unappropriated, the penalty belonged to the Crown. The court decided that it might be sued for by the King in a court of revenue, and not by indictment.

In Barnardistone, K. B. 108, on an indictment on the same statute, Mr. Reeves is reported to have said, that the bricklayers had the right to sue by the statute, and that therefore the indictment was wrong. "The court," adds the reporter, "did not enter into that exception, but said they thought it bad upon another: because an indictment does not seem a proper remedy, to recover a penalty given to the King by an act of Parliament. They thought this proper only for a prosecution in the Exchequer; so arrested the judgment."

In Viner's Abridgment, tit. Statutes, (E. 6,) Construction of Statutes, the same law is clearly laid down. "(75) Where an act of Parliament gives a particular penalty, the party shall not be punished by indictment. (6 Mod. 86.)" "(77) Where an act of

Parliament gives a penalty to the King for doing such an act, and does not make it an offence indictable, the party ought to be sued in the Exchequer for the penalty, as for a duty vested in the Crown, but is not therefore indictable. Gilb. 47. The King v. Manning."

"Where a thing is prohibited by statute under a penalty, if the penalty or part of it be not given to him who will sue for the same, it goes and belongs to the King. 2 Hawk. P. C. c. 26, § 17. Rast. Entr. 433."

"Every statute made against an injury, gives a remedy by action expressly, or impliedly. 2 Inst. 55, 74."

"Wherever a matter concerns the public government, and no particular person is entitled to an action, there an action will lie for the King. 1 Salk. 374."

"If there be no appropriation of a statute penalty, it is a debt due to the King, and suable in a court of revenue and not by indictment. Viner's Abr. Statutes. General Principles, art. 1, ch. 196, s. 37."

"10 Co. 75. An action is a consequent, and a thing implied in everything prohibited by a statute. 2 Inst. 159."

"Wherever a penalty is given by a statute, but no suit, debt lies for this penalty. Viner's Abr. Statutes. General Principles, art. 6, ch. 196, s. 3. Welden v. Vesey, Poph. 175."

All these authorities show, that wherever an act is prohibited under a certain penalty, and the penalty is unappropriated, and no particular mode of recovering it is pointed out by statute, the penalty belongs to the State, which may sue for the same in a penal action, although the statute does not expressly state this.

Salmon's case, (1 Lord Raymond, 64,) was cited by the court to show that a civil action, debt, would lie to recover the penalty affixed by statute, 14 Hen. VIII. c. 5, to practising physic, without a license. The Attorney General says: "The language of Chief Justice Holt, is too plain, to admit of a doubt. He said that the case of debt, for tithes upon the statute of Edward VI. was at first a strain; because it gave an action of debt, whereas the statute gave but treble damages; but the party should rather have had an action upon the statute."

Nothing in Holt's language is intended to intimate that a crimi-Vol. VII. 39

nal action or indictment should have been resorted to. Holt considered debt a *strain*, because debt was the proper action to recover a sum certain; a liquidated, definite amount; while the statute gave but treble damages, a sum uncertain and to be assessed: and therefore he thought the party should rather have had "an action upon the statute;" a different, but still a civil action; not an indictment, a criminal prosecution, as the Attorney General erroneously infers.

But it is asserted, that the right to sue was expressly given to the plaintiffs in Salmon's case, by the statute. This is a mistake. The statute gave one-half the penalty to the King, and the other half to the College of Physicians. Being entitled to one-half of the penalty, although there is no express, specific declaration in the statute, that the college should have a right to sue for the penalty, the law necessarily implied that the college had that right. Comyn, in his Digest, verbo, Debt, A. (1), says: "Debt lies upon every contract in deed or in law. As, if an act of Parliament gives a penalty, and does not say to whom, nor by what action it shall be recovered, an action of debt lies upon such statute by the party grieved: as upon the statute, 14 Hen. VIII. c. 5, (the very statute referred to in Salmon's case,) that every practiser of physic in London, without a license, shall forfeit £5 a month, a moiety to the King, and a moiety to the College of Physicians."

The Attorney General asserts, that "Chief Justice Marshall never said, that almost every fine and forfeiture under a penal statute, may be recovered in an action, or an information of debt." And yet these are the very words of that illustrious Judge, used by him in the case of Adams v. Woods, 2 Cranch, 339.

The Attorney General is at a loss to conceive, what possible bearing the case of Lyman can have on the question now before the court. The court quoted that case for the great principle which pervades it, and which is applicable to the point now before us, viz., that where a debt of a sum certain, arises by statute, an action or information of debt is the appropriate remedy to recover it, unless some other remedy is prescribed by the statute; (1 Mason's Rep. 498;) or, to use the language of Judge Story himself, on another occasion. "I take it to be clear that an

information of debt in the Exchequer for a penalty, is as much a civil proceeding as an action of debt. Without question, all infractions of public laws, are offences; and it is the mode of prosecution which ordinarily distinguishes penal statutes from criminal statutes. It is laid down as law in Rex v. Malland, (2 Str. 828,) that where a pecuniary penalty is annexed to an offence, and no mode of prosecution is prescribed, an indictment does not lie thereon; but only an information of debt in the Exchequer. Yet it seems to be admitted, that the Court of Exchequer has no criminal jurisdiction; and, therefore, if the offence had been simply prohibited without annexing a penalty, the King's Bench, and not the Exchequer, would have had jurisdiction to punish."

This reasoning answers the labored argument of the Attorney General, that " Williams has been guilty of a crime and offence by the infraction of a public law." It is exactly, because it is for an offence against the public law, that the penalty in the act of 1817 is given to the State. In 2 Vent. 268, C. B. the court held, that " penalties were given to the King for the public good, and interest of the government, as well as for the King's treasure. There is no exception out of this construction upon penal statutes, unless they are in recompense for the damage suffered by a subject, &c. And this follows the reason of the common law, that fines. and penalties for offences at law, go to the King, as the head of the government; and that was the second reason the court went upon, that the offence was principally against the King, it being against the administration of justice. This is indeed the case of all crimes of a public nature. The King is most evidently injured by them. Now who should have the forfeiture, or penalty, but he that has the greatest share in the injury." In the case of Thornby v. Fleetwood, 1 Comyn's Rep. 210, Chief Justice 'Trevor, delivering the unanimous opinion of the Court of Common Pleas, says: "When an act of Parliament gives a forfeiture, and does not say who shall have it, if it be for a public crime and offence against the government, the law will give it to the King; for though for a private wrong, the penalty may sometimes, by way of recompense, belong to the party grieved, yet for a public offence, the law will give it to the King, as the

head of the public; so it was resolved in 2 Vent. 268. 3 Lev. 289. Sid. 148, 86."

Apply the reasoning of Judge Story, to the case of Williams, and it will run thus: Williams' infraction of the law of 1817—if there was any such infraction—was doubtless an offence. Without question, all infractions of public laws are offences; but it is the well established law of the land, that where a pecuniary penalty is annexed to an offence, and no mode of prosecution is prescribed, an indictment does not lie thereon; but only a civil action: in other words, to use the very language of Judge Martin in this case, "where a statute is purely penal; where nothing is inflicted by it but a pecuniary penalty or fine; no imprisonment, no punishment, nothing but a fixed, definite, pecuniary penalty; and no mode of prosecution is prescribed, an indictment does not lie, but only a civil action to recover the penalty."

The Attorney General in his review of the authorities cited by the court, passes, sub silentio, the case of Marquand, (2 Gallis. Rep. 554.) But its language is too important to remain unnoticed, especially as the following portion of it, fully supports the opinion of the court: "at common law, wherever a penalty is given, and no appropriation or method of recovery is prescribed by the act, an action or information of debt lies, and not an indictment."

The Attorney General attempts to show that the case of Matthews v. Offley, (3 Sumner's Rep. 120, 121,) quoted by Judge Martin, has no bearing upon the point before the court. But the direct applicability of the principles contained in the following extract from Judge Story's decision in that case, will be at once perceived: "Upon general principles, where a pecuniary penalty or forfeiture is inflicted for any public offence or wrong, it seems clear, that the action to recover the penalty or forfeiture must be brought in the name of the government, and not in the name of any private party, unless some other mode for the recovery is prescribed by some statute; and the usual remedy in cases of a pecuniary penalty, is an action or information of debt by the government itself. This is the rule of the common law; and therefore it has been held, that a suit will not lie by a common informer for such a penalty, unless power is given to him for that

purpose by statute; neither will an indictment lie for such a penalty, unless also specially allowed by statute; for it is properly recoverable as a debt, in a court of revenue by the government; and is in no just sense a criminal proceeding."

Apply this to Williams' case: By our statute, a pecuniary forfeiture or penalty is inflicted for the public offence or wrong of bringing a convict slave here; no mode to recover the penalty is pointed out, and no indictment is specially allowed by statute. An indictment, therefore, will not lie; the penalty is recoverable as a debt in the civil courts, and is in no just sense a criminal proceeding.

The Attorney General has not cited a solitary case to show that an indictment would be a proper remedy in the case before the court.

A re-hearing having been granted, MARTIN and GARLAND, Judges, adhered to the opinions originally pronounced by them.

BULLARD, J. My opinion remains unchanged by the new arguments adduced for the defendant; and I think the appeal ought to be dismissed, for the reasons stated in my first opinion.

MORPHY, J. When this case was last before the court, I concurred in the opinion entertained by a majority of my colleagues; but further reflection having brought me to a different conclusion, it is proper that I should state briefly the grounds on which it rests. I deem it unnecessary to go into the inquiry, whether this court can constitutionally exercise appellate criminal jurisdiction. My individual impression has always been, and still is, that the terms of the constitution are not clearly exclusive of such jurisdiction: but, at the same time, I think, that after the repeated decisions of this court, the question can no more be considered as an open one. The Legislature, moreover, have never made any provision for the exercise of criminal jurisdiction by this tribunal, and have lately established a Court of Appeals in Criminal Cases. The only ground then on which we can entertain this appeal must be, that the present is a civil case, and should have been prosecuted as such. It is admitted, on all hands, that penal actions are civil suits, and cannot be carried on by indictment, unless that mode of proceeding is pointed out by the statute denouncing the fine or penalty. But the question here, is,

whether the act of 1817, under which Williams has been indicted, creates a crime or misdemeanor punishable criminally, and to be prosecuted by information or indictment; or whether that law only gives a penal action, in the legal acceptation of the term; in other words, whether it is a penal statute as contradistinguished from a criminal law.

The statute enacts: "That no slave shall be imported or brought into this State, who shall have been convicted of the crimes of murder, rape, arson, manslaughter, attempt to murder, burglary, or having raised or attempted to raise an insurrection among the slaves in any State of the Union, or elsewhere; and, if any such should be, they shall, on conviction thereof, be seized and sold, for cash, to the highest bidder, after fifteen days notice of time and place of sale, one-half of the purchase money to be applied to the use of the State, and the other half to the informer; and any person who shall import or bring into the State such slaves, knowing that they have been convicted of any of the above mentioned crimes, shall, upon conviction before any court of competent jurisdiction, be fined for each and every such slave in the sum of five hundred dollars, one-half to be applied to the use of the State, and the other half to the use of the informer."

It has not been, nor can it be pretended, that the importation into this State of slaves convicted of any of the felonies enumerated in this law, is not a serious public wrong, or offence. inquiry then is, how should it have been prosecuted under our laws. The Legislature have provided, that all prosecutions for capital or infamous crimes, or offences punishable by imprisonment at hard labor, shall be by indictment duly found by a grand jury; and prosecutions for all other offences may be by information. B. & C.'s Dig. 197, § 42. This law has been so far amended by an act approved March 8th, 1841, that in all criminal prosecutions in the Criminal Court of the First District for crimes punishable by not more than two years hard labor, the proceedings may be by information. These enactments entirely do away with all the difficulties which exist in the common law States, as to what matters are indictable or not. We have in this State no common law offences punishable with fine and imprisonment; with us, all crimes and misdemeanors must be created

by statute, and can only be punished in the manner provided for If the Legislature merely prohibits an act without annexing a punishment for doing it, no one is punishable for having done the act. As to the manner of prosecuting offences against the criminal laws of the State, it is regulated, as we have seen, according to the degree of punishment inflicted for their commission. If our statutes are examined, it will be found that there are many offences not punishable otherwise than by fines; and that the word punishment is not unfrequently used in reference to the infliction of such fines. It will be further found, that in some instances the sanction of the law is a fine or an imprisonment, or both, at the discretion of the court; and that whenever the fine is not paid, the punishment of imprisonment for a period not exceeding one year, is substituted in lieu of it. B. & Us. Dig. 247, 248, 259, 260, 510, 548. Acts of 1842, p. 260. From all these provisions of our laws, it is fair and reasonable to infer, that all offences for which an indictment is not required, may be prosecuted by information, whether the punishment denounced for their commission be fine, imprisonment, or both. an ex officio information could have been filed against Williams, the Attorney General could, a fortiori, submit an indictment against him to a grand jury, as the latter mode of proceeding is considered as affording greater security to the accused.

Blackstone tells us, that "Informations are of two sorts: first, those which are partly at the suit of the King, and partly at that of a subject: and secondly, such as are only in the name of the King. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the King, and another to the use of the informer, and are a sort of qui tam actions (the nature of which was explained in a former volume) only carried on by a criminal instead of a civil process." 4 Black. 308. 3 Black. 160. We find also in Chitty, that criminal informations are to be filed on particular acts of Parliament, which inflict a penalty upon conviction, one-half to the use of the King, and the other to the use of the informer. He also calls these informations a sort of penal action, only carried on by criminal instead of civil process. 1 Chitty's Criminal Law, 137. These authorities, which stand deservedly high, ap-

pear fully to sustain the course pursued by the Attorney General. They show, that it is not enough that a pecuniary penalty be of a sum certain, or that a part of it be given to the King, and the other half to an informer, to justify a suit, either on the part of the King, or on the part of a common informer. If a statute imposing a fine does not authorize its recovery by action of debt, bill, plaint, or information of debt, but merely denounces such fine or penalty to be paid by the offender on conviction, the law is properly a criminal one, and the offender must be prosecuted by information. 'The fine, in such a case, is the consequence of and follows the conviction, and is to be applied when recovered. in the manner pointed out by the statute. It is the mode of prosecution which ordinarily distinguishes penal statutes from criminal laws, because most penal statutes direct that the penalty may be recovered by action or information; but when the right to sue for and recover the penalty is not given, the mode of prosecution is the same as under any other criminal law. Thus Blackstone and Chitty call an information on statutes which inflict a fine or penalty upon conviction of the offender, a sort of qui tam action to be carried on by a criminal process, in contradistinction to qui tam actions properly speaking, which are civil suits, authorized generally by penal statutes.

The Attorney General contends, that no penal action or suit for the recovery of a penalty can be maintained, unless the authority to sue for it or to recover it, is expressly given by the statute on which the action was founded. In this position he appears to be fully supported by 3 Blacks. 160. Bacon's Abridg. verbo, Actions, qui tam. 2 Hawkins, ch. 26, p. 104. This last writer says: "I take it for granted that they (qui tam actions) lie on no statute which prohibits a thing as being an immediate offence against the public good in general under a certain penalty, unless the whole or part of such penalty be expressly given to him who will sue for it, because, otherwise, it goes to the King, and nothing can be demanded by the party; but where such statute gives any part of such penalty to him who will sue for it by action or information, &c., I take it to be settled at this day, that any one may bring such action or infor-

mation, and lay his demand tam pro domino rege quam pro seipso."

In the latter case the King may himself bring the suit; but if any one of his subjects has commenced it before him, he cannot maintain it. The several decisions relied on by the defendant's counsel do not contradict, but rather support this doctrine. will on examination, be found to be based on statutes giving in express terms, the right to sue for and recover the penalty. some of these cases the question was only as to the form of the action to be resorted to, when the right to sue for the penalty is given. These decisions show, that it is well settled that an action of debt is the proper remedy, but none of them establish that when, as in the present case, a statute prohibits an act under a pecuniary penalty to be paid by the offender on conviction, without giving the right to sue for the recovery of such penalty, an action or information of debt lies. It has been urged that, admitting it to be clear that no ordinary individual can sue to recover a penalty by a penal action, unless the statute creating the penalty authorizes him to do so, yet, where a statute prohibits a thing under a certain pecuniary penalty, without making any appropriation of the penalty, the unappropriated penalty goes to the Crown in England, and if nothing is said as to the recovery, that it must be sued for in a court of revenue. and not by indictment. Admitting that the authorities quoted in support of this position show that such is the common law doctrine on the subject, which is by no means clear, it appears to me. that we must be governed by those provisions of our own laws which prescribe the manner in which crimes and offences are to be prosecuted in this State, whatever be the punishment affixed to them, unless the statute imposing a fine for the violation of a public law authorizes its recovery by a penal action or civil suit. The distinction between criminal laws and penal statutes is clearly marked in our legislative enactments, although the statutes on which penal actions can be brought are not very numerous. They will be found in the inspection laws, in the laws in relation to lotteries, ferries, &c. B. & C.'s Dig. 501 to 506, 1 Moreau's Dig. 477 to 493. In these laws the right to sue for and recover the penalty is allowed to the party aggrieved. Vol. VII.

to a common informer, or to the State. The act of 1832, giving civil jurisdiction to the Criminal Court of the First District, and allowing an appeal to this tribunal, was no doubt intended to apply to suits brought under these laws; but not to prosecutions which are directed by law to be carried on by information, but which may be also by indictment, if the public prosecutor see fit to adopt that proceeding, which is more favorable to the ac-The act of 1817 is criminal law. It contains no provision for the recovery of the fine by suit; its language excludes the idea of a civil proceeding, as it imposes the fine upon the conviction of the offender, and orders it to be applied one-half to the use of the State, and one-half to the use of the informer. The word informer in this law, evidently means an informer in a criminal prosecution, who gives information to the proper officers of the commission of the offence. If the fine which is imposed as a punishment for the violation of the act be not paid, the law substitutes in lieu of it that of imprisonment for a period not exceeding one year. B. & C.'s Dig. 260, § 10. How, then, can the obligation to pay this fine be said to be a mere civil debt, for which, under our present laws no imprisonment exists? If it can at all be viewed as a debt, it is one which only arises from the conviction of the offender, and for which he is not legally bound until such conviction. It can moreover, be discharged by the imprisonment provided for in case of non-payment, while an ordinary debt was not extinguished by the imprisonment of the debtor, when that harsh remedy was allowed by our laws. In treating of the different kinds of punishment known to the law, Chitty remarks: "That fines are the lowest species of punishment which courts of justice have power to inflict." "That when an act of Parliament directs a fine at the will of the King, this is always understood to mean at the discretion of the judges, and they fix it at their pleasure within constitutional boundaries; but when the statute specifies the sum to be forfeited, the courts have no power to mitigate it after conviction." He concludes by saying, that "it should seem that the defendant is not entitled to his discharge from imprisonment in respect of such fine, on the ground of his being an insolvent debtor, as it is not a debt, but a punishment for a crime."

As relates to the forfeiture of the slaves, admitting, as it is contended, that the proceeding should have been by civil process, and that there is error in the sentence passed upon Williams, so far as it decrees such forfeiture upon an indictment founded on that part of the statute imposing the fine, such an error cannot authorize us to revise the sentence of the Criminal Court. If, in relation to the slaves, the proceeding was coram non judice, the sentence has not impaired the defendant's title and right of ownership in them. I am, therefore, of opinion, that the motion to dismiss filed by the Attorney General should prevail.

Simon, J. The important question which this case presents, having been fully investigated on a re-hearing, a further attentive consideration thereof has brought me to a different conclusion from that which I had heretofore adopted. I am now firmly of opinion, that the Legislature intended by the enactment of the act of the 29th of January, 1817, under which the defendant was indicted, to create a crime or misdemeanor punishable criminally. The penalty or fine imposed upon the defendant upon conviction, in default of the payment or the recovery of which. the convicted party, under the act of the 19th of March, 1818, is to be imprisoned for a period not exceeding one year, cannot, in my opinion, be made the subject of a penal action by civil suit: it must be prosecuted by an indictment or information. Without entering into any further discussion of the question. which, I must confess, appeared to me at the outset to be a very doubtful one, I deem it sufficient to refer to the reasons adduced. and the authorities cited by my colleague Judge Morphy, whose views I have adopted, and to conclude with him, that the present appeal ought to be dismissed.

Appeal dismissed.

JOHN C. WILLIAMS v. THE BANK of LOUISIANA.

The refusal of a mortgagee to consent to the erasure of a mortgage will not subject him to the payment of damages, though the mortgage had ceased to exist, where there is no proof of any actual injury, nor of any fraud or bad motive on the part of the mortgagee, who merely asserted a legal right which he believed to exist.

APPEAL from the District Court of the First District, Buchanan, J.

R. N., and A. N. Ogden, for the plaintiff. This action is founded on art. 2294 of the Civil Code. The loss sustained by the plaintiff is attributable to the wanton assertion of a right to a mortgage on plaintiff's property, which the defendants knew, at the time, that they had no claim to. They are, consequently responsible for the damages sustained. Percy v. Millaudon, 3 Thornton v. Mansker, 10 La. 121. The defendants having no color of title to any mortgage, malice must be inferred. Henry v. Dufilho, 14 La. 48. In assessing damages the court should consider the trouble and inconvenience to which plaintiff has been subjected in seeking relief. Guice v. Harvey. 14 La. 190. Plaintiff's having complied with the judgment of the court in his suit against Duer, by giving security, in order to prevent delay, is not an acknowledgment of the correctness of the judgment. Pemberton v. Zacharie, 5 La. 312. A corporation is responsible for every injurious act done by them. Rabassa v. Orleans Navigation Company, 5 La. 461. Mabire v. Canal Bank, 11 La. 86. 2 Kent's Comm. 284. 3 Pike's Rep. 398.

L. Peirce, for the appellants.

Simon, J.* The Bank of Louisiana is appellant from a judgment by which it is made liable to pay to the plaintiff the sum of \$11,305 91, as damages sustained by the plaintiff in consequence of certain repeated assertions and pretensions made and set up by the Board of Directors, as to the existence of a conventional mortgage on a plantation and slaves, previously sold by the

Judges Morrhy and Garland, being interested in the question, did not sit on the trial of this case.

plaintiff to one Duer, which mortgage the Bank refused to erase and release, on being applied to for that purpose by the plaintiff.

The history of this case is as follows: The plaintiff having purchased at the probate sale of the succession of F. A. Browder, a certain plantation called the "Arlington Estate," with sixty-three slaves, and all the agricultural implements and improvements thereon, sold the same, on the 17th of July, 1835, to Robert Duer, for the sum of \$154,000, of which twenty thousand dollars were paid in cash, and the balance was payable in ten instalments for which the purchaser gave his notes, bearing ten per cent interest. This property, when belonging to the estate of Browder, was subject to a mortgage, among others, in favor of the Bank of Louisiana, which mortgage had not been released at the time of the sale by Williams to Duer. The vendor retained his mortgage until complete payment; and shortly after released his mortgage on ten of the slaves.

The second note, for \$11,007, having become due in April, 1839, and having been protested for non-payment, Williams, on the 20th of May following, obtained an order of seizure and sale of the property sold to Duer, and was about causing the same to be executed, when the defendant arrested his proceedings by an opposition and injunction, on several grounds; among which it was alleged, "that the purchaser of the plantation and slaves was exposed to the risk of being disturbed by an outstanding mortgage in favor of the Bank of Louisiana, whose existence was not declared at the time of the contract, and against which the plaintiff, his vendor, was bound in warranty." This opposition, founded upon three distinct grounds, became the subject of a suit to which the Bank of Louisiana was not made a party; and the District Court being of opinion, that there was not sufficient evidence of the extinguishment of the mortgage in favor of the Bank, directed as to this ground, that Williams should give . security against the incumbrance; which condition was immediately acquiesced in by the plaintiff, who, in order to be enabled to proceed, furnished the security required. The defendant, however, took an appeal to this court; and the whole case having been brought up, the judgment appealed from was affirmed. See 14 La. 523.

It appears, further, that the injunction obtained by Duer having been dissolved by the District Court, and the defendant having taken a suspensive appeal, Williams applied for and obtained, pending the appeal, writs of sequestration and injunction, and had the crops growing on the plantation sequestered. This proceeding was had by virtue of the privilege claimed by Williams on the fruits of the property seized; and the District Court having rescinded and set aside the writ of sequestration, and dissolved the injunction, an appeal was taken by the plaintiff to this court; whereupon the judgment of the inferior court was reversed, the writs of sequestration and injunction reinstated, and the case remanded for further proceedings. See 14 La. 532.

The record further shows, that previous to Williams' obtaining his order of seizure and sale against Duer's property, applications were made by him (Williams) to the Bank of Louisiana, for the purpose of obtaining from that bank the release of the mortgage existing on the property at the time of his purchase. The Board of Directors were advised by their counsel, that they could properly give a certificate stating that the Bank had no claim upon the Arlington plantation, formerly belonging to F. A. Browder; such a certificate was prepared and presented to the Bank on the 23d of April, 1839, but the Bank having refused to grant it, the plaintiff, on the 4th of May following, took a rule on it and other persons, to show cause why the different mortgages therein stated, should not be erased from the record books of the Recorder of Mortgages of the parish of East Baton Rouge. object of this rule was strenuously contested by the Bank of Louisiana, whose claim against the estate of Browder had been much reduced, and amounted only to \$4216 with interest; and the District Court having ordered all the inscriptions of mortgages existing on the property adjudicated to Williams, and, among others, that of the Bank of Louisiana, to be erased and cancelled, the Bank took an appeal to this court, upon which the judgment complained of was affirmed. See 17 La. 378.

It further appears from the evidence, that the Arlington plantation having been offered for sale by the Sheriff on the 17th July, 1840, by virtue of the order of seizure and sale heretofore enjoin-

**Section which may have taken place between the date of the sale of the period of the first seizure and that of the sale. It may be attributed partly or wholly to the depreciation which may have taken place between the date of the sale to Duer, and that of the sale by the Sheriff; and nothing shows for what proportion, if any, the plaintiff can set up a claim for damages for the delay occasioned by Duer's injunction. The evidence establishes Duer's complete inability to pay any part of the balance due to the plaintiff; but proves also that his sureties on the injunction bond are perfectly solvent and able to pay the amount of the bond.

The District Judge based his judgment in favor of the plaintiff on the value of Duer's crop made in 1839, and on the legal expenses incurred in the injunction suit, stating in his judgment, that it is presumable, had it not been for the injunction suit, that the plaintiff would have obtained possession of the Arlington plantation in June, 1839, and would not have incurred the charges of that suit. He estimates the crop, according to the evidence, at \$9108 56, which added to \$2197 35 of costs, as shown by the return of the order of seizure and sale, makes a sum of \$11,305 91, which the defendants are condemned to pay to the plaintiff.

It is first to be noticed, that the existence of the mortgage insisted on by the Bank of Louisiana, was not the only ground upon which Duer's application for an injunction was founded. His petition contains other grounds, which, of themselves, would have been sufficient to support his demand; and we are not prepared to say, that the refusal of the Bank to cancel a mortgage which was to secure a sum of only \$4216, was the cause, nay, the principal cause of Duer's objecting to the seizure and sale of the property. It appears that he complained of Williams' non-compliance with a subsequent contract alleged to have been entered into between them. This was the main cause of the controversy; and had the difficulty that existed between the parties been limited to the effect of the Bank's mortgage, it is evident

that Williams' acquiescence in the condition imposed upon him by the judgment of the District Court, would have put an end to the controversy. He was ordered to furnish security, which he did without further objection. He showed himself thereby fully satisfied with the judgment; and had there been no other impediment to the Sheriff's proceeding to the execution of the order of seizure and sale, it is clear that Duer would have had no ground for an appeal, and that the dissolution of the injunction would have had its full effect. 14 La. 525. If this be true, how can it be said that the mortgage asserted by the Bank was the only cause of the injunction? How can it be pretended that without the Bank's mortgage there would have been no obstacle to the Sheriff's executing the order of seizure and sale? The Judge, a. quo, says, that it is presumable, had it not been for the injunction suit, the plaintiff would have obtained possession of the property in June, 1839, and would not have incurred heavy expenses. This is correct, as to the consequences of the injunction; but we cannot agree with him as to the cause. The Bank's pretended mortgage was not the principal or only cause, and this cause had ceased previous to the appeal taken by the complainant, Duer.

Now, it is also shown by the evidence, that some time before Williams' application for an order of seizure and sale, he had taken a rule on the Bank to show cause why the mortgage subsequently complained of hy Duer, should not be released. controversy was pending at the time of the executory process. and Williams well knew that it could not be determined before the day fixed for the sale. He was aware that this would be an obstacle to the sale, and that, whether right or wrong, the Bank's pretensions would perhaps give Duer a right to demand security for the amount of the mortgage. Civ. Code, art. 2535. not, then, his duty to offer him the security required by law? Would not such an offer have put an end to the difficulty? This he did afterwards; but it is obvious that if the offer had been made previous to the injunction suit, this ground could not have availed the debtor as one of those upon which the injunction was obtained.

From the facts stated in our decision reported in 17 La. 398, it is clear, that the Bank's mortgage had ceased to have any effect,

long previous to the executory proceedings resorted to by the plaintiff; and that the Board of Directors would have run no risk in following the advice of their able counsel. They were applied to for that purpose by the plaintiff, and they refused; but is this a reason why the institution should be mulcted in heavy damages, when no fraud or any other bad motive is brought home to the Board of Directors? They asserted a legal right which they conceived had never been lost; this right became the subject of a serious litigation, and it did not require less than a decision of this court to convince them, that their pretensions were unfounded, and that, by their own acts, they had lost their mortgage. But again, why should we allow the plaintiff to be compensated for the consequences (uncertain as to their being the cause of any injury,) of the error of his adversaries? Nothing shows that the latter were not in good faith. As directors of a bank, they are acting for others as well as for themselves. They had no improper motive in view; none in which they could have had any interest but that of securing the amount due to their institution; and it does not seem to us, under the circumstances, that they can be made liable to pay any thing more than the costs of the suit in which their defence was unsuccessful, and their alleged right of mortgage annulled and rejected. Were it otherwise, there would be danger in asserting and endeavoring to sustein a misconceived legal right, and this would often be followed by the most unjust and injurious consequences.

We have been referred to the case of Wilkins' Heirs v. Bassett, lately decided in the Western District, as being analogous to the present one; but we think that there is a vast difference between the two cases. There, Wilkins who was the defendant's vendor and warrantor, and who had issued an order of seizure and sale against the property to satisfy the claim for the purchase money, had in his possession the receipts and other vouchers necessary to obtain the release of a pre-existing mortgage reserved in favor of his own vendor; he withheld those documents, though called on repeatedly by his vendee and by the Sheriff to get the release of the mortgage, which was a great obstacle to the Sheriff's selling the property; this he always refused to do, and the consequence was, that the property could not be sold but at a

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late period, and at a very great sacrifice. He was the active cause of the injury, by his constant refusal to get the release, as he well knew that the mortgage did not exist and had been paid for; and we said that, by the terms of his warranty, he was bound to clear the property of all encumbrances, and was not authorized, by any principle of law or justice, to keep a mortgage hanging over it, when it was in the market for sale, and it was the interest of the defendant, his vendee, to give a good title and get a fair price. Here, on the contrary, there was no obligation on the part of the Bank to release the mortgage, unless the amount secured by it had been paid. There was a balance yet due on that amount; and although the mortgage was subsequently pronounced to have been destroyed by the acts of the mortgagee, we cannot say that it was the legal, or even the moral duty of the Bank to erase it, on being simply applied to for that purpose, as they had reason at least to doubt whether their acts had the effect of depriving them of the benefit of their security. If they erred, it was in good faith; and this cannot give to the plaintiff any right of action against the Bank, who stood upon their legal rights, and whose error could not be, and was not ascertained but by the result of a judicial contest.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, and that ours be for the defendants with costs in both courts.

THOMAS GIBBES MORGAN V. STEPHEN HERRIMAN.

APPEAL from the Parish Court of New Orleans, Maurian, J. Morgan, appellant, pro se.

Preston, for the defendant.

MARTIN, J. The plaintiff seeks to set aside the sale of a female slave and her infant child purchased from the defendant, on account of a redhibitory malady. The defendant pleaded the general issue, and called McFarlane, his vendor, in warranty, who relied on the same plea.

There was judgment against the plaintiff, and he has appealed.

As is often the case in redhibitory actions, the testimony is complicated. In weighing it, we have come to a different conclusion from that of our learned brother of the Parish Court. This renders it necessary that the case should be remanded, at least in regard to the defendant's claim on his vendor. Between the plaintiff and defendant, the testimony in favor of the redhibition considerably outweighs, in our opinion, that against it.

It is, therefore, ordered and decreed, that the judgment be reversed. It is further ordered, that the sale be annulled; that the plaintiff recover from the defendant the sum of five hundred dollars, the part of the price of said slave which he received from the plaintiff; and that he return the plaintiff's note for the same sum, which he received as the balance of the price of said slave, within twenty days from the notification of the present judgment, or deposit the same, for the use of the plaintiff, in the office of the clerk of the Parish Court within the said time; and that in default of the return or deposit of said note, the plaintiff recover from him the further sum of five hundred dollars, with costs in both courts; and that as to the present defendant, and McFarlane, his vendor, the case be remanded for further proceedings.

JULIUS C. TUPPER and another v. JAMES H. SCOTT.

The rights of an assignee of a deed of trust executed in another State, must be determined by the conditions of the assignment. In proceeding under the deed of trust he must conform to the conditions on which it was assigned to him.

Where a deed of trust requires that public notice shall be given for a certain number of days of any sale made under it, the particular day on which the sale is to take place, must be notified to the public for the time required. If, after such notice, the sale be postponed, new notice must be given, for the full time required, of the day to which it is postponed.

APPEAL from the District Court of the First District, Bu-chanan, J.

Mott and W. M. Randolph, for the plaintiffs.

Peyton and I. W. Smith, for the appellant.

Bullard, J. This is an action to recover of the defendant

three slaves, to which the plaintiffs assert title under a trust sale in the State of Mississippi. The slaves, together with other property, had been mortgaged in the form of a deed of trust, by one Saunders, to secure the payment of a note due by him to Folkes, Walker & Co., for \$4500; and the trustees proceeded to sell the slaves, and the plaintiffs became the purchasers of those sued for in this action. The deed gave to the trustees the power to sell the property at auction to the highest bidder, at the request of the holder of the note, by giving twenty days' notice, in any newspaper published in Hinds or Madison county, of the time and place of sale.

The defendant answers, after a general denial of all the facts and allegations not admitted, that the plaintiff, Tupper, who is an attorney at law, was employed by him in 1837 or 1838, and that he thus learned from the defendant the fact that some of his slaves had been mortgaged by Saunders without any authority; that, taking advantage of this information, he had, by various contrivances, managed to get possession of the note and deed of trust, and to use the same in order to extort money from the defendant; that the slaves have been since 1836, to the knowledge of the plaintiff, Tupper, the defendant's property; and that he Tupper, the plaintiff, has become the purchaser of all the other property included in the deed of trust, without giving credit for any part. He further alleges, that all right and title to and in the trust deed is vested in him by arrangement with the plaintiffs; and finally, that all the plaintiffs' proceedings are irregular, null and void, and convey no title.

The view we have taken of this case makes it unnecessary to go into a detail of all the facts which led to the controversy. We will confine ourselves to an inquiry into the circumstances under which the plaintiffs became possessed of the note and deed of trust, and whether it was not upon conditions inconsistent with their proceedings under it, and their attempt to recover the slaves in this suit; and secondly, whether, even supposing they had a right to sell, they, the trustees, complied with the formalities required by the deed of trust.

The record shows, that the plaintiffs are the assignees of one Puckett, and were so at the time of the trustees' sale, at which

they purchased the slaves. He had become the assignee of the deed of trust by assignment from Tupper and Walker. Puckett was examined as a witness, and testified that most of the property embraced in the deed of trust, had been sold by the Sheriff of Madison county, subject to the deed of trust, and for much less than it would otherwise have brought; that Saunders had already paid about \$2000, and that the deed was assigned on the day of sale: that Walker and Tupper purchased the greater part of the property; that he, Puckett, gave Tupper \$1000 on his half of the purchase; that the execution under which the property was sold, belonged to Puckett, and that the land was bought for him; that the property was delivered to him with the deed of trust; that all parties then considered the debt liquidated; that when he re-assigned the deed of trust to Tupper, it was agreed that it was to be used solely to procure good titles to the land; that the assignee was to consider the land alone liable under the deed, and that he, Puckett, while he held the deed, had often assured Scott that his negroes should not be taken, as he considered it settled. witness says: "I told him (Tupper) that I considered the deed of trust void; he replied, that he also doubted it, and that Rollins thought as he did. I, however, agreed to transfer the deed to him, if he would consider the land alone liable under it."

Thus it appears, that the plaintiffs procured a re-assignment of of the deed of trust and note, merely for the purpose of extinguishing the encumbrance which they created on the land purchased at the Sheriff's sale, which had been sold subject to that encumbrance.

Another witness, (Wyley,) annexes to his deposition a copy of the acknowledgment in writing of Tupper, in the nature of a counter letter, showing the conditions upon which the trust deed had been re-assigned by Puckett to him. It is not signed by the assignor, but appears to have been deposited by him subject to his order in the hands of the witness. It shows the conditions of the assignment to have been somewhat different from what Puckett understood them. Tupper states the purpose for which the assignment was made, to have been to secure him against liability on a bill of exchange drawn by himself and Walker on Hobson & Gooch, which was given to Folkes, Walker & Co., as

a part of the consideration for the transfer to him and Walker of the note and deed of trust, which bill Puckett had agreed to take up when he acquired the deed and note from Tupper and Walker, and he agrees to hold the property embraced in the deed of trust liable alone for the amount of said draft, \$1600 or \$1700, and for a note of Puckett's for \$1000. He further agrees, that if he purchases and gets possession of the land, and his title is not defeated by Puckett or his creditors, he will release him from all liability on the bill of exchange, and agrees to give up his note for \$1000. Puckett has also a right to redeem his property in the deed of trust, at any time before Tupper and Walker are compelled to pay the bill of exchange.

Whichever be the true version of this agreement, or the understanding between these parties, it appears to us clear, that Tupper had no right to proceed under the deed of trust, without showing at least that the conditions had failed. So far as it concerned Saunders, the debt was extinct as soon as his property had been sold subject to it, and the purchaser had become the assignee of the debt; at least until it was shown that the property thus sold was not enough to pay it. Puckett and the plaintiffs seem to us, to have taken up a correct impression at first as to the value of the note and deed of trust after the sale of Saunders' land, especially after Puckett had promised Scott that the other slaves should not be seized and sold under it.

Even if this were doubted, there is another ground fatal to the pretensions of the plaintiffs. The sale was not made after twenty days' public notice, as required by the deed of trust. The sale was on the 12th of January. The advertisement which was published first on the 5th of December, announced the sale for the 25th of the same month. On that day it was postponed until the 12th of January, when the sale took place. But there was no public notice for twenty days, that the sale would take place on that day. The postponement of the sale to a particular day, ought to have been notified for twenty days. The time at which the sale took place, was not made known to the public twenty days before the sale. From the 5th of December until the 25th, the public was informed that the sale would take place on that day, and not seventeen or eighteen days afterwards.

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It is not necessary to examine the questions of practice, which arose in the progress of the trial, being of opinion that the plaintiffs cannot recover in any aspect of the case.

It is, therefore, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and ours is for the defendant, with costs in both courts.

STEPHEN W. RANDALL v. J. T. LAGUERENNE and another.

The master and others employed in the navigation of a vessel, though servants of the owners in different grades of authority, are competent witnesses for their employers. A witness is not incompetent because he is, or has been in the employment of the party who calls him.

APPEAL from the Commercial Court of New Orleans, Watts, J. Benjamin, for the plaintiff.

Remy and Soulé, for the appellants.

SIMON, J. The defendants are appellants from a judgment which condemns them to pay, in solido, to the plaintiff, the sum of \$1655 17, being the balance due on an account in which the defendants are charged, at the date of 2d of January, 1842, with the sum of \$3937 50, for charter money due him as owner of the schooner Bella del Mar, from the 15th of May, 1841, to that date, being seven months and a half, at \$525 per month.

The answer admits, that the defendants chartered the schooner as stated in the petition, but contends, that the most important clauses contained in the contract were violated by the plaintiff, to the injury, loss, and damage of the defendants. It is further alleged in the answer, that a certain quantity of salt was delivered on board of the schooner at the port of New Orleans, which the captain undertook to deliver at Vera Cruz; but that only a a part of it was delivered to the consignees, thereby creating a deficit and actual loss of \$2030, which the defendants claim to be compensated for. It is also stated, that in violation of the second article of the charter party, the captain and owners of the schooner received on board of her, freight not belonging to the charterers, thus creating a concurrence of trade highly injurious

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to the defendants, who are thereby entitled to claim the sum of \$2000, the penalty imposed upon the plaintiff by the charter party. The defendants, therefore, ask for judgment in reconvention against the plaintiff, for the sum of \$2361 50, the balance due on their account, after crediting the plaintiff with the whole amount of his demand. The record contains a bill of exceptions to the opinion of the Judge, a quo, permitting the testimony of the captain and crew of the schooner to be produced in evidence. The objection was, that the steward and the other persons whose testimony is adduced in proof, having co-operated with the plaintiff to take away during the night the salt belonging to the defendants, ought to be considered as interested parties. The inferior Judge did not err. There is no proof in the record of the facts imputed to the witnesses, and it is not even alleged in the answer; but even supposing such allegations to have been set up, the charges would not render the witnesses incompetent. well known, that a co-trespasser is a competent witness in behalf of his confederate, being, in no event, interested in the decision of the suit; that a witness is not incompetent because he is, or has been in the service of the party who calls him; and that, although all persons employed in the navigation of vessels, are direct servants of the owners in different grades of authority, this does not render them incompetent to testify on behalf of their employers. Mart. 29. 1 lb. N. S. 243. 4 lb. N. S. 340, 539. 2 lb. N. S. 455. 4 La. 201.

On the merits, several witnesses have been examined to sustain the defence, but the purport of their testimony does not in any manner affect the plaintiff's right to recover. It is true, the whole quantity of salt taken on board was not delivered, but this is satisfactorily accounted for as being the result of uncontrolable circumstances and the dangers of the sea, such as the inclemency of the weather and the roughness of the sea, which caused the vessel to leak so badly that the pumps were in constant activity until the vessel reached its destination. The vessel was subsequently taken to a sea-port on the Gulf of Mexico to be repaired; and from the facts disclosed as to the quality of the salt when received on board, and the leaking of the vessel in consequence of a gale experienced during the voyage, it is not aston-

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ishing that the salt, which had been taken light and dry on board, should have fallen short by the quantity established by the evidence. There is no proof that any of the salt was taken out of the vessel during the voyage, except that three or four buckets full were furnished by the captain of his own salt, which was in the forecastle, for the purpose of salting provisions. This salt did not belong to the cargo. It was a part of about twenty-five sacks which the captain had purchased, and put on board, in the forecastle and in the house on deck. These last circumstances, which are the only facts adduced in support of the defence, are so unimportant, that it is hardly necessary to notice them.

On the whole, we think the judgment appealed from is correct; but we are not prepared to say, that this is a case in which damages should be allowed for a frivolous appeal.

Judgment affirmed.

JOHN DONALDSON v. JOHN WALKER.

In an action for a balance due for labor and materials, an account proved to have been furnished by plaintiff to defendant, may be offered in evidence by the latter, though not in the hand-writing of plaintiff; but the plaintiff may introduce evidence to destroy its effect.

APPEAL from the Parish Court of New Orleans, Maurian, J. Schmidt, for the plaintiff.

Bartlette, for the appellant.

MORPHY, J. This action was brought to recover \$4800 for work and labor done, and materials furnished, in the erection of three houses for the defendant in Villeré street, and \$31 50 for carpenters' work done, and materials furnished, on another building of the defendant's in Marais street. The defendant, after pleading the general issue, denies that he is in any manner indebted to the plaintiff, but avers, on the contrary, that the latter is indebted to him. He further avers, that this suit is only brought for the purpose of annoying him. He pleads prescription, and prays that the suit may be dismissed with costs. Subsequently to the filing of this answer, and while the trial of the case was progress-

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ing, the defendant pleaded specially, as a peremptory exception founded on law, the existence of a partnership between the parties in relation to the building of the houses in question; and prayed that as the petitioner had not sued for a settlement, he should be dismissed. The Judge was of opinion that no partnership was proved, and gave judgment in favor of the plaintiff for \$4210, with privilege on the houses built or repaired, reserving to the defendant his right to prosecute and recover from the plaintiff, in due course of law, all such sums as he may be entitled to, for moneys paid or materials furnished for the three houses, the value of which the plaintiff is allowed to recover in this suit. After a strenuous, but ineffectual attempt to obtain a new trial, the defendant has appealed.

From the confused and contradictory character of the evidence before us, we would have been disposed not to interfere with the decision made by the Judge below, were it not that there are some features of this case which induce us to apprehend that great injustice might be done, by finally passing upon the rights of the parties in the present state of the record. A large number of witnesses were examined, from whose testimony it appears that, although it was Donaldson who principally carried on and superintended the building of these houses, payments were made and materials were furnished alike by both him and the defendant. Some of the witnesses represent them as having acted and held themselves out as partners in the undertaking. The evidence shows, that there were six houses constructed on lots originally belonging to Walker. Conversations between the parties are stated by the witnesses, from which they understood that Donaldson, who had a sum of \$1800 to invest, was, after building the six houses with Walker, to become the owner of one-half of the whole property. The houses appear to have been completed in Feb., 1838, and in June following Walker executed a sale to the plaintiff of one half of his land for \$1800. In this sale it is mentioned that the houses standing on the portion of ground sold, were erected by Donaldson at his own expense. Whether any settlement took place between the parties in relation to the joint undertaking for building these houses does not appear; nor is it shown, except from the sale, which purports to be a cash one,

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how the price of \$1800 was paid by Donaldson for the ground sold to him. It is a somewhat singular circumstance, that the plaintiff, who is represented as having had only a sum of \$1800, should have paid in cash the price of the lots he purchased of the defendant, after building three houses for the latter, and three other houses for himself. But what is still more singular, and not accounted for by the evidence, is, that after completing those houses, the plaintiff should have remained more than three years and a half without ever claiming of the defendant any compensation for his labor, or the reimbursement of the large amount of money that must have been expended on the buildings. suit was brought only on the 20th of September, 1841, and one of the plaintiff's own witnesses testifies, that the plaintiff told him that the work he had been doing for the defendant in Marais street, in February, 1841, was to pay a debt he then owed him, the defendant. On the trial of the case, the defendant offered in evidence an account furnished him by the plaintiff, in May, 1841, showing a balance due to him by the plaintiff, at that time, of \$41 19; but this account was rejected on the objection of the plaintiff's counsel that the account had been altered, that it did not come within the pleadings, and was not in the hand-writing of Donaldson. We think this account, which had been specially pleaded in the answer, should have been admitted, subject to whatever proof might have been adduced to destroy its force and effect.* Upon the whole, we think that the ends of justice will be best promoted by remanding this case for a new trial. Both parties may come prepared with. additional testimony, and may so shape their pleadings as to bring to light the true merits of the case, and dispel the mystery which seems to hang over it.

It is, therefore, ordered, that the judgment of the Parish Court

The bill of exceptions signed by the Judge, recites that defendant offered the account in evidence "after having proved that it was furnished in April, or May, 1841, by plaintiff to defendant, leaving a balance of \$41 19, due by plaintiff at the time; and that at the time said account was thus furnished, it contained all the charges it now does, and the same credit, and was summed up at the bottom as it is now, leaving the said balance due by plaintiff."

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be reversed, and that this case be remanded for further proceedings according to law; the plaintiff and appellee paying the costs of this appeal.



F. C. GILLETT v. JOSEPH LANDIS and another.

In an action to recover from defendants damages for their failure to deliver to plaintiff certain notes, which they had improperly delivered to a third person, the value of the notes at the time they should have been delivered to plaintiff is the measure of the damages to which he is entitled, no fraud being alleged or proved; without prejudice, however, to his right of action against such third person for the delivery of the notes.

APPEAL from the District Court of the First District, Buchanan, J.

W. S. Upton and Cooley, for the appellant.

Benjamin, for the defendants.

Simon, J. This case has already been before us, and was remanded for the purpose of assessing the amount of damages sustained by the plaintiff. 17 La. 470. The controversy was submitted to a jury, who found a verdict in favor of the plaintiff for one dollar damages; and after an ineffectual attempt to obtain a new trial, he has appealed.

The motion for a new trial is based particularly on the ground that the order of this court remanding the cause, presented one simple question, and but one for the consideration of the jury, viz.: what damages had Gillet sustained by the neglect and refusal of Landis & Co. to deliver to him the notes described in the petition? And it was contended below, that the evidence clearly establishes that, in consequence of such neglect, Gillett had been deprived of the opportunity and means of paying a debt to the amount of said notes; and that the verdict is wrong, because it did not decree the restoration of them.

We said in our first decision, that "the defendants ought not to have delivered the notes to Joyce; that they did so at their peril; and that they are, therefore, bound to make good to the plaintiff the loss which he may have sustained, from not having had in

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his possession at the time they became due, the three notes which he had a right to claim of the defendants by virtue of the transfer;" and we added that, "as all that the plaintiff can require, is to be placed in the same situation in which he would have been, if the notes had been delivered up to him by the defendants at the time he made his application, said defendants cannot in justice be made liable beyond the real value of the notes at that time."

The evidence adduced on the question of damages submitted to the jury, appears somewhat contradictory. On the one hand, it is shown, that the notes of George R. Wright, (the drawer of the notes,) in 1837, were considered by some of the witnesses to have been good for \$3000 or \$4000, and that said witnesses believed him solvent in August, 1837. One of the witnesses states, that he would like to have got such notes as those drawn by Wright to the order of Joyce, payable at 4, 8, and 12 months from April. 1837, each for the sum of \$1250, as he himself owed Wright nearly that amount, and knew four or five good men who owed Wright as much as \$1000 each. Another testifies that from the faith he had in Wright, he would have taken these bills at par. in liquidation of a debt previous to Wright's failure: that at the time, and for two years previous, Wright was looked upon as a very honorable man; but that after he had something to do with the steamboat Invincible, he became notorious for selling as a commission merchant, and not accounting for the sales. other hand, it is established that Wright failed in November, 1837, (before the second note fell due,) having sued his creditors in the Parish Court of New Orleans. One of the witnesses says that, admitting all the persons whose names appear on the notes to be insolvent, and considering them so far as relates to the mortgages on the steamboat, he does not think the notes were worth the 100th part of a dollar; and another proves that, having sued Wright in 1838, for the recovery of certain notes, he could not make a dollar.

Under the facts and circumstances disclosed by the evidence found in the record, we do not feel ourselves authorized to say that the verdict complained of is manifestly erroneous. As we said in our former decision, this case was a proper one to be sub-

mitted to a jury. The Judge below was satisfied with their verdict. Having heard the witnesses, he was much better able than we are, to judge of the degree of faith and credit to be placed on the testimony; and his conclusion was, that the verdict was correct. We cannot say that he erred.

With regard to the three notes which the appellant contends should have been ordered to be returned to him by the defendants, unless full damages had been decreed against them—this is the very ground upon which the plaintiff's claim for damages was based. The notes had been improperly delivered by the defenant to Joyce; the object of the action was to compensate the plaintiff for the loss by him sustained, in being deprived of the possession of said notes at the time they became due; and we understand the verdict of the jury to be an estimate of the value of said notes at the time they should have been delivered to the plaintiff. This is all that the plaintiff could claim of the defendants, against whom no fraud has been alleged or shown; without prejudice however, to his right of action against Joyce for the delivery of the notes, which the latter had perhaps no right to demand or receive from the defendants.

Judgment affirmed.



ROBERT HEATH v. THE COMMERCIAL BANK OF NEW ORLEANS.

A promise to pay a bill, made by an endorser who has been discharged by the lackes of the holder, to be binding, must have been made with full knowledge of such lackes, and with the intention of waiving his legal rights. Direct proof of such knowledge is not required; it may be inferred from circumstances attending the promise.

Money paid by the endorser of a bill who had been discharged by the laches of the holder, in ignorance of his discharge, may be recovered back. C. C. 2280. There is, on his part, no such natural obligation to pay, as can prevent his recovering the amount. C. C. 2281. Per Cariam: His undertaking was, to pay, provided the holder made due demand of the acceptor, and gave him due notice of non-acceptance or non-payment. His obligation was conditional; and when the condition failed, he was under no obligation, either natural or civil, to pay.

APPEAL from the District Court of the First District, Buchanan, J.

Elmore and W. W. King, for the plaintiff. Knowledge of the fact that he was discharged must be shown, in order to bind an endorser by a subsequent promise to pay. 1 Robinson, 572. 8 Mart. 148. 11 La. 16. 12 La. 465. 16 La. 317. Money paid through error may be recovered back. Civ. Code, arts. 2280, 2284. Code of Pract. art. 16. 2 La. 129. Bailey on Bills, 189, 190. Garland v. Salem Bank, 7 Mass. 408. Chitty on Bills, (ed. 1830,) 236, note.

Maybin, for the appellants. The plaintiff cannot recover back the amount paid, having been under a natural obligation to pay. Civ. Code, arts. 1751, 1752, 2281, 2284, 2285. Plaintiff's claim is similar to one for the recovery back of usurious interest; (2 La. 428:) or of an amount paid in discharge of a debt barred by prescription. Civ. Code, art. 2285. The plaintiff knew, or had the means of knowing, all the circumstances attending the transaction; and, in neither case, can he recover. Where a payment has been made by an endorser in ignorance of the lackes of the holder, the amount can be recovered back only where the party making such payment has been prejudiced by the conduct of the holder, or there has been wilful concealment on his part. Chitty on Bills, (Am. ed. 1826,) 238. Such is also the French law. 2 Pardessus, p. 484, § 434. 4 Favard, Repert. verbo, Quasi Contrat, § 12, p. 680. It is not pretended that any fraud was practised on the plantiff.

Plaintiff was not entitled to notice of non-acceptance from England. 3 Kent's Comm. 107, 108. ed. 1840. Besides the authorities there cited, see 15 Eng. Com. Law Rep. 245. 9 East, 347. 2 Halsted, 130. 5 Cowen, 303. 4 Mason, 366. It was the duty of the Bank here to have given the notice, with which, the plaintiff residing in the same city in which the Bank is established, must have been served either personally, or by being left at his counting house. If any notice had been served in the first way, he must have known the fact; or, if in the latter, he must have had the means of knowing it. Debuys v. Mollere, 3 Mart. N. S. 320. It must be inferred then that he knew, at the time of making the promise to pay, that there had been no notice.

MORPHY, J. This is an action brought to recover back money which the plaintiff alleges was paid through error by his agent,

under the belief that, as endorser of a bill of exchange held by the defendants, he was bound, when in point of fact he was not so bound, and had been discharged by the failure of the holder of the bill to give him notice of its dishonor for want of accep-The evidence shows that the bill, which was payable sixty days after sight, was endorsed by the Bank to their agents at Liverpool, Reid, Irving & Co.; that, on being presented to the drawes, it was refused acceptance, and protested on the 22d of February, 1842; that notice of this protest was not given to the plaintiff, but that on the 11th of June following, he was duly notified of the bill having been protested for non-payment, by a letter addressed to him by the cashier of the Bank. This officer testifies that, in a conversation with him, Heath expressed his willingness to settle for the difference which might exist between the amount of the bill, and the proceeds of a shipment against which it had been drawn. The precise time at which this conversation took place does not clearly appear. The witness cannot say whether it was prior to, or after the date of his letter giving notice of the non-payment of the bill; but that this promise to pay any sum which might remain due, was made by Heath before his departure, which took place on the 25th of June, It is shown, that on the arrival of Heath in England, and on ascertaining that no notice of the non-acceptance of the bill had been forwarded to him, he wrote to his agent here, John R. McMurdo, not to pay the bill nor any balance due on it, as he had been discharged by the neglect of the holder to give him notice; but that in the mean time, McMurdo being unapprised of the defendants' laches, had settled for the balance apparently due to the Bank, to wit, \$1138 10.

The defendants rely on the promise to pay made to their cashier, from which they say it must be inferred, that the plaintiff had notice of the non-acceptance, or waived it, and they aver that he cannot recover back the money paid in consequence of such promise as at the time of making it he knew, or had the means of knowing, the circumstances attending the transaction. To this it is replied, that this promise is, at most, but presumptive evidence of notice, which must yield to the positive proof in the record that no notice of the non-acceptance of the bill was given to the plaintiff,

that such promise cannot be viewed as a waiver of notice, as there is no proof that Heath, when he made it, was apprised of the want of notice, and that he could not waive that of the existence of which he was not aware; that notices of the dishonor of a bill are either actual or constructive; that Heath, when he made the promise, may have believed that there had been a notice transmitted to him, though it had not reached him; that under this impression, he might have considered himself liable, but that it now turns out that no notice of any kind was given; that, therefore, the promise was made in ignorance of the true state of the facts, and is not binding any more than the payment made in consequence of it, and under the same mistake. But it is insisted, that Heath was not entitled to notice from England: that as the Bank had endorsed the bill to Reid, Irving & Co., the course would have been for those agents to notify the defendants of the protest, and for the latter to have then given notice to the plaintiff, their immediate endorser; that as both parties lived in New Orleans, such notice must have been either personally served, or left at his counting-house; that he must have known he had not received the first kind of notice, and by proper inquiry and diligence might have ascertained that the latter had not been given; that, therefore, the plaintiff knew, or had the means of knowing that notice had not been given; and that by his promise and subsequent payment, he waived the right to take advantage of such want of notice. Nothing is better settled than. that a subsequent promise, to be binding on an endorser who has been discharged by the holder's laches, must be made with a full knowledge of such laches, and with an intention to waive his legal rights. It is true, that affirmative proof of such knowledge is not required, and that it may be inferred from the circumstances attending the promise. In the present case, they are not such as necessarily induce us to believe that Heath knew that no notice of non-acceptance had been given. Although it is sufficient for agents to give notice only to their principals of the dishonor of a bill, it is not unusual for them to notify all the antecedent parties, and the plaintiff may well have believed that he had done so in the present instance. As soon as he discovered that no such notice had been given, he retracted his promise by

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instructing his agent not to pay the bill. A promise thus made, in ignorance of the facts which discharge a party, is not binding, and money paid under it can be recovered back. Bailey on Bills, 297. 9 Mass. 408. 4 Dallas, 109. 8 Johnson, 384. 12 Johnson, 423. 12 La 467. 16 La. 317. This case comes clearly with in the purview of article 2280, and the following, of our Code, which authorize the recovery of any sum paid on the supposition of an obligation which did not exist, or from which the party had been released.

The defendants next urge that, admitting the plaintiff was under no civil obligation to pay the bill, by reason of the laches of the holders, yet there was on his part such a natural obligation to pay it as should preclude him from recovering back the amount paid. The undertaking of the plaintiff was to pay the bill provided the holder made due demand of the acceptor, and gave him due notice of the non-acceptance of the bill. His obligation was, therefore, a conditional one. When the condition failed he was under no obligation, either natural or civil, to pay the bill. He was completely and entirely discharged.

Judgment affirmed.

CAROLINE E. WILCOX and Husband v. STEPHEN HENDERSON.

Though a minor who has been emancipated by marriage become a widow before the age of twenty-one, she will not return to the state of pupilage.

A tutor, not shown to have received any property belonging to his ward, has no account to render.

To render valid the ratification of an obligation against which an action of nullity or rescission would lie, the act of ratification must state the substance of the obligation, the motive of the action of nullity or rescission, and the intention to supply the defect on which such action would be founded. C. C. 2252.

APPEAL from the District Court of East Baton Rouge, Johnson, J. T. G. Morgan, for the plaintiffs. Elam, for the appellant.

GARLAND, J. The petitioner, Caroline E. Wilcox, represents that, on the 1st of January, 1842, she being then a minor, and also the widow of the late H. A. S. Mussenden, was induced by

the defendant, to make a promissory note payable to him for \$5856 92, with interest at ten per cent from date. She avers, that the note was given without consideration, and at a time when she was incapable of contracting, or binding herself by any such obligation. She further alleges that, on or about the 12th of March, 1842, the defendant induced her to draw a draft, or order on W. & J. Montgomery, of New Orleans, for the sum of \$823 61, without consideration, and upon the unjust and improper representation that said sum was owing by her. when it was not. She further avers that, on or about the 9th of August, 1842, shortly after her marriage with her present husband, the defendant procured from him a promissory note drawn by Henry Doyle, for the sum of \$3125, with interest at six per cent per annum, from the 1st of June previous until paid, which note is her property and was transferred without consideration, being intended as an appropriation to discharge, in part, the aforesaid note of \$5886 92 This note she claims to recover also.

She further represents, that she is joint owner, with George Henderson, of a plantation called the Forest Plantation, with a large number of slaves, situated in the parish of West Feliciana. and that the defendant has for the years 1839, 1840 and 1841, received the revenues of the same, and not accounted for them. The crop for the year 1839 was 564 bales, and the nett proceeds \$22,024 61; that of 1840 was 366 bales, and the nett proceeds \$13,027 62; and that of 1841 was 316 bales, and the nett proceeds \$11,481 52; to one half of all which she is entitled, and yet defendant refuses to account to her for it, her said portion being \$23,266 97. The petition concludes with a prayer for an account of the proceeds of the crops and interest; also, for a restitution of the note of the petitioner for \$5886 92, and of that of Dovle for \$3125, with interest as stated, and for \$823 61, the amount of the draft mentioned; and for a judgment to meet the different allegations.

The defendant for answer denies all the allegations not specially admitted; and avers, that it is true he was appointed tutor to the plaintiff, Caroline, as stated in the petition, but that before he received any property belonging to her, she was emancipated by her marriage with H. A. S. Mussenden. He admits that during the years 1839, 1810 and 1841, he had the control and man-

agement of the Forest Plantation, the joint property of the plaintiff, Caroline, and her brother, but that he did not administer her interest as tutor, but as agent, at the request of herself and her husband, Mussenden, to whom he has faithfully accounted and paid every thing, the correctness of which accounts cannot be examined in this action, and have not been legally questioned. further avers, that when the petitioner executed her note on the 1st January, 1842, it was for an acknowledged balance due on account of the administration of her revenues, which it was competent for her to make, and relative to which she could contract; and that subsequently, when arrived at the age of majority, she ratified and confirmed the correctness of these acts, and has never authorized any one to question them. He specially denies the averment that the draft of \$823 61, was given without consideration, and upon his representation that she owed the amount when she did not. He avers, that the note drawn by Doyle was transferred in part payment of the note of the petitioner Caroline, dated January 1st, 1842, which was for a balance of an account stated and rendered on the 31st December, 1841. He further alleges, that all the transactions referred to, resulted from his management of the interest of the petitioner Caroline, in the plantation aforesaid, and the settlement of the affairs of Mussenden, her late husband, agreeably to her request. He alleges, that no error is disclosed or stated that requires examina--tion, or gives a cause of action. After a special reservation of claims, which he intends hereafter to present for the board and education of the petitioner Caroline, the defendant proceeds to claim a balance of \$2761 92 with interest, as due on the note given on 1st January, 1842; and asks for a judgment in reconvention.

By an amended answer, the defendant denies that the petitioner Caroline E. Wilcox authorized the institution of this suit, and the averments in the petition that the note and draft were obtained without consideration, and when she was incapable of contracting, and propounds interrogatories to her to know if she did authorize the proceedings and averments. To these interrogatories she answered, that she knew of the existence of the suit, and left the control and management of the business to her hus-

band. After these answers were given, the defendant again amended his answer, and alleged, that as Wilcox, the husband of the plaintiff Caroline, had assumed the control of the case, and of the personal actions of his wife, he had approved and ratified the drawing of the draft, as he had in December, 1842, settled the affairs of the Forest Plantation for that year with defendant, and in the account stated, the draft on W. & J. Montgomery was charged with interest and costs of protest; to prove which facts, interrogatories were propounded to Whitman Wilcox, the husband, who answered that the draft was not included in the settlement; that he expressly forbade the firm of W. & J. Montgomery from paying it; and that it was in no manner recognized in that settletlement, which was not final, but intended merely to ascertain the portion of George Henderson in the crop of that year.

In January, 1843, the plaintiffs amended their petition, and interrogated the defendant as to whether the wages of the overseer on the plantation for the year 1841 had been paid, and if not, to whom he looked for payment. The answers admit that the wages have not been paid, and that the overseer looks to the plaintiffs for payment. About the same time, the defendant filed an exception, that the District Court is without jurisdiction to inquire into his acts as tutor, and can only decide upon those as agent of the plaintiff Caroline, and of her former husband, all his acts as tutor having been ratified by an act passed on the 30th of May, 1842.

The facts necessary to be stated are, that a number of years ago, the defendant took into his family the plaintiff and her brother, who are his niece and nephew, and who had lost their father, the brother of defendant, when they were very young. They had little or no property, and he was in very moderate circumstances, with a considerable family to support; yet the plaintiff and her brother were always treated as the children of the defendant. When the late Stephen Henderson died, in the year 1838, the plaintiff, her brother, and the defendant, became his heirs, and were legatees named in his will for some moderate legacies; but by the compromise entered into in 1839 in relation to that rather extraordinary testament, all these parties suddenly became possessed of large fortunes. In the early part of the month

of April, 1839, the defendant was appointed tutor to his niece and nephew, and in a few weeks after, the former was married to one H. A. S. Mussenden, both of them being minors, and before the compromise was completed. An under-tutor was appointed, and to complete the compromise, it seems a curator, ad hoc, was also appointed to represent Mussenden and his wife. By this compromise, the Forest Plantation, slaves, &c., valued at nearly \$100,000, and assets to a large amount, fell to the plaintiff and her brother, which plantation and slaves remained without partition until December, 1842. In his answer the defendant avers, and the evidence shows it to be true, that after he was appointed tutor, he received nothing of value on account of the plaintiff previous to her marriage; and he also alleges that, although he managed and controlled the Forest Plantation and its revenues, he did so, not as her tutor, but as agent of herself and her husband, both being emancipated by their marriage, and also as tutor of George Henderson, her brother, who owned one-half of it. the subsequent stages of this controversy, the defendant endeavored to recall this admission, and insisted strongly, in the Probate Court of West Feliciana, when, in 1842, he was sued for a partition, that he was tutor; and there was some difficulty in getting possession of the portion of the land and slaves belonging to the plaintiff Caroline. He also contended, that the District Court could not compel him to account; and, in fact, every means which able and ingenious counsel could devise, have been resorted to for the purpose of defeating this action. On the 5th of March, 1840, the plaintiff Caroline, and her former husband, gave the defendant a receipt in full for her share of the crop made on the Forest Plantation in 1839, and no complaint is made that it was executed in fraud or error. On the 28th of August, 1840, the defendant gave Mussenden a receipt for a draft of \$2507 79, drawn on W. & J. Montgomery, which he says will, if paid, be in full of all accounts against him and wife to that date. This draft, it subsequently appears, was paid by W. & J. Montgomery, and charged to the plaintiff, Caroline, and her first husband. These documents show that, at the close of the summer of 1840, the parties had closed their accounts. In the month of December, 1840, Mussenden being in bad health, determined to seek a milder climate, and the plaintiff (his wife,) accompanied him to

several of the West India Islands, where, in the month of June. 1841, he died. Previously to leaving Baton Rouge, on the 17th of December, 1840, Mussenden and his wife gave the defendant a general power of attorney to act for them, by virtue of which he administered all their affairs, signed and endorsed notes, some of them payable to himself, and did all that seemed proper to himself. When Mussenden left the State, the defendant held his notes given for the price of a printing press and establishment for publishing a newspaper, for upwards of \$4500, payable in April, 1841, and April, 1842. He also owed some other debts, but to what amount is not shown. The defendant had the first series of these notes, due in April, 1841, discounted in bank; and when they fell due, he paid a part on them, and renewed the notes as agent, paying the curtailment and interest out of the revenues of the plantation, or the profits of the printing establishment, which was carried on for Mussenden's benefit, in his absence, and the expenses charged to him; but we see no credit for any proceeds from it. He also sold one-half of the establishment to Hueston for \$2500, on a credit; and, as soon as he heard of Mussenden's death, took out letters of administration on his estate, and in October, 1841, before the plaintiff Caroline returned to the State, sold all his property, for upwards of \$3000, and took into his possession a large amount of accounts purporting to be owing to the printing establishment, some of which have been collected. The household furniture was purchased in the name of the plaintiff Caroline, and, so far as the record informs us, she has not paid for it. In December, 1841, she returned to this State, and in a short time after, renounced the community of acquests existing between her and her late husband. and left his succession in the defendant's hands, who continues to be its administrator, so far as we know.

On the 31st of December, 1841, the defendant presented to the plaintiff Caroline, (she being still under twenty-one years of age,) two accounts; one in the name of herself, and the other in the name of her late husband and herself, containing a variety of items, some relating to the plantation and her expenses abroad, and some to her late husband's affairs, including one or more of the notes given by Mussenden for the newspaper establishment, and held by defendant. By these accounts he made it appear

that the plaintiff was indebted to him in the sum of \$5886 92. for which he took her note, payable on demand, with interest as stated in the petition. In these accounts errors are alleged to exist, on account of which it is prayed that the note may be returned and cancelled. Either from design or accident, or from not possessing a competent knowledge of the mode of keeping accounts, the defendant has mingled his individual affairs, those of the Forest Plantation, in which his nephew is interested, and those of the succession of Mussenden in the same settlement, and makes the plaintiff liable to him for all. The first item in his account against Mussenden and wife, is a charge of \$4939 38 with interest, as the amount of their account due to W. & J. Montgomery, on 31st December, 1840; and the second is an item of \$2746 76, with interest, as owing to the same persons on the 8th of March, 1841. When we turn to the accounts of Messrs. Montgomery, which are in evidence, we find that, on the 31st of December, 1840, they acknowledge a balance against themselves in favor of Mussenden of \$4925 87; on the 8th of March, 1841, there is a balance of \$43 59 in his favor; and on the 31st of December, 1841, the same merchants acknowledge a balance in their hands in favor of Mussenden's estate of \$5519 48. though the plaintiff Caroline, as soon as she returned to the State. renounced the succession of her first husband, she is regularly charged with many of his debts; and the items are mingled in a manner difficult to be understood. Some short time after this settlement took place, the plaintiff Caroline arrived at the age of majority; and, in the latter part of the spring of 1842, it being rumored that she was about to marry her present husband, the defendant conceived the plan of having a ratification of his acts in relation to different matters, particularly in relation to that of the compromise made with the heirs of Stephen Henderson; and in that act, which was drawn by the defendant himself on the book of the Parish Judge and ex officio notary public, among many other things, it is stated, that she has received of the defendant \$625, being her fourth of a sum of money received by him from the executors of Stephen Henderson, previous to the compromise, but of which no mention is made in any account. She is also made to declare, that she has received the one half of the nett

amount of the crops and revenues of the Forest Plantation for the years 1839, 1840, and 1841, specifying the amount of each year's revenue. The act then proceeds to declare, that on a settlement of accounts on the 31st of December, 1841, the appearer, (meaning the plaintiff Caroline,) was indebted to him, (the defendant,) in the sum of \$5886 92, for money and advances, for which sum she has given her note, dated on the 1st of January, 1842, with ten per cent interest, "which she hereby acknowledges and confirms." Then follows an acknowledgment, that she has received full and satisfactory accounts and vouchers of the administration of the defendant, both as tutor and superintendent of the Forest Plantation. The evidence shows that, a few days before the passing of this act, defendant sent to the plaintiff Caroline, by his clerk and man of all work, the accounts on file, and left them with her several days for examination; but what vouchers accompanied them, is not shown with much certainty. It is proved, that when these documents were left, she looked over them, and complained of the charges of interest, when the witness who carried them assured her, there was nothing wrong, but that if there was, it was his (witness') error, and not that of the defendant. She then said, that she supposed all was right; and expressed a wish that the defendant should not be informed that she had complained; and intimated her willingness to sign whatever act should be prepared. The one she did sign was written out by the defendant, without the slightest communication with the plaintiff Caroline, read over by him to her in the notary's office. in presence of the witnesses, and signed without objection; the accounts, so far as they related to any acts of tutorship, not being submitted to the inspection of the Probate Judge, who was the notary public, and present at the time.

The evidence further shows, that the plaintiff Caroline, although a woman of ordinary understanding, was married at an early age, to a husband not arrived at the age of majority; that she gave no attention, or but little, to accounts; that she had been brought up by the defendant as one of his children, and had the most unlimited confidence in him; that after her marriage he continued to transact most of the business in which she was interested, up to the moment of passing the act of discharge, and Vol. VII.

even afterwards, for we see that he continued to manage the plantation during the year 1842; and the possession of her half of it, and of the crop of that year, were only obtained after legal proceedings, bitterly contested for several months, after her second marriage. The note of Doyle was transferred to the defendant at his request, a few weeks after the marriage with Wilcox, when the latter seems to have had but little information in relation to the property belonging to his wife, and supposed she was largely indebted to her uncle. It was also attempted to be proved, that the plaintiff Caroline, had promised to pay all the debts of Mussenden, except one, which effort resulted in establishing that she had expressed a strong desire that these debts should be paid, but not that she promised to discharge them out of her own means. A witness named McFadgen, swears to a positive promise, or rather to an admission of a promise, made to him privately and in a low tone of voice, not heard by any one else, and after the commencement of this suit. This witness, from his own account, is a kind of agent of all work of the defendant, and evidently testifies under a strong bias in favor of his employer.

The District Judge seems to have listened to all the evidence with much patience. He saw the witnesses, and heard not only them, but the parties also, answer the questions propounded to them; and being fully satisfied that there were serious errors in the settlement, gave a judgment in favor of the plaintiffs, ordering the note given on the 1st day of January, 1842, to be delivered up to be cancelled, and the note of Doyle to be returned, or, in default thereof, a judgment to be given against defendant for its amount with interest; from which the latter has appealed.

We have no doubt that the plaintiff Caroline and Mussenden, were both emancipated by their marriage in April, 1839; and we have as little that she, by becoming a widow in 1841, previous to the age of majority, did not thereby return to a state of pupilage. The absurdity of such a proposition will be strongly illustrated by the fact, that before she was twenty-one years old, she was a mother and a widow, and consequently the tutrix of her minor child. It would be somewhat strange to see a widow representing her child as natural tutrix, whilst she was herself subject to the control of a dative tutor.

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It is not shown that the defendant, as tutor, received anything belonging to the plaintiff Caroline, in the short period between his appointment as such, and her marriage; therefore, according to the doctrines stated in the case of Wilson v. Craighead, (6 Robinson, 429,) and in previous decisions, he had nothing to account for in that capacity. Of course, all that has been said in the case in relation to the administration as tutor and the rendition of an account and vouchers as such, may be passed over without comment, being irrelevant to the case. After the compromise among the heirs and legatees of Stephen Henderson in 1839, the defendant acted as the agent of the plaintiff Caroline. and as tutor of George Henderson, in the management of the plantation. In the transactions with Shipley, Walker, and Mussenden, in relation to the sale of the printing establishment and the transfer of the notes, the defendant was acting for himself. In December, 1840, when the defendant took a power of attorney from Mussenden and his wife, all parties seemed to understand their relationship; that was not altered until Mussenden died. and the defendant became his administrator, in the autumn of 1841. If the defendant had administered separately the interests confided to him in his different capacities, there would have been but little risk of confusion and error; but, as he has conducted the business, it was almost impossible to prevent mistakes; and some gross errors are apparent in the accounts rendered when the note sued for was executed, and the act of the 30th May, 1842, passed. The shortest and best mode of making a correct settlement, as it appears to us, is to put the parties in the position they stood in, on the 31st of December, 1841. Then a fair settlement can be made of the plantation affairs and accounts, between the defendant, as tutor of George Henderson, and the plaintiff Caroline; also between her, and the defendant as her agent; and between him, and the succession of Mussenden; and if the defendant can hold the plaintiff Caroline responsible for the debts of her former husband, the question can be tried separately. How the parties will stand, when the rights of each are separately investigated, remains to be seen; but, as the matter now stands, the defendant has an advantage acquired by asserting his pupil's rights in his individual name, and charging

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the plaintiff Caroline with the debts of the succession he administers; also in charging, as paid by himself, what the Messrs. Montgomery have paid out of the proceeds of the crops from the plantation. The testimony satisfies us, that the plaintiff Caroline was not capable of understanding correctly accounts rendered in the manner those were by the defendant; that she relied confidently on his acts and assurances; and that she has fallen into errors of a grave nature, such as will, in our opinion, avoid the note executed at the time.

We do not think the act passed on the 30th of May, 1842, a sufficient ratification of the previous transaction. It does not state any errors or omissions which it was intended to correct or ratify, and is a mere repetition of a previous promise, which the party supposed to be obligatory, not then being informed of the errors that made it voidable or void. Article 2252 of the Civil Code, and the decision of this court in 1 Robinson, 457, bear directly on this point; and state what is necessary to make a complete ratification. Nor does the giving of the note of Doyle, on account of the larger one given to the defendant, make the case stronger. The amount of the note, though paid in full, could have been recovered back, if paid in error. It is a cause which will, in all cases where proved, avoid a contract; and the party is entitled to relief, even on a contract which has been executed.

The plaintiffs have asked us to amend the judgment, by allowing the sum of \$823 61, the amount of a draft drawn by the plaintiff Caroline, on W. & J. Montgomery, the proceeds of which went into the hands of the defendant, for the purpose as he alleges, of paying a portion of Mussenden's notes, falling due in 1842. As our judgment will open all the matters in controversy between the parties for future investigation, we will leave this claim to be examined with the others.

The judgment of the District Court is therefore affirmed, with costs in both courts; but this judgment is not in any manner to prejudice or affect any claims the parties may have against each other, arising out of or included in the settlements made on the 31st of December, 1841, and in May, 1842.

Beal v. Alexander.

WILLIAM M. BEAL v. CALER P. ALEXANDER.

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The garnishees having bonded certain property attached by plaintiff, a third person subsequently intervened claiming the property and praying for a dissolution of the attachment. On an exception by plaintiff on the ground that the property had been released on the execution of the bond, the intervention was dismissed. Per Curiam: Property attached is represented by the bond given for its release only as to the attaching creditor, and for the sole purpose of satisfying any judgment he may obtain. Third persons, claiming it as owners after it has been boaded, must look to the property itself, which is no longer under the control of the court.

APPEAL from the Commercial Court of New Orleans, Watts, J. Hoffman, for the plaintiff.

T. Slidell, for the appellants.

Morphy, J. This suit was brought against the defendant, a resident of Mississippi, as the endorser of a note drawn to his order by the Bank of Grenada, located in that State, at Grenada, and made payable at the counting-house of the plaintiff, in the city of New Orleans. A number of bales of cotton were attached in the hands of Nugent, Turpin & Watt, as garnishees, which were afterwards bonded by the latter. The defendant, through the counsel appointed to represent him, pleaded the general issue, and averred, that he had been induced to endorse the note sued on under the idea conveyed and held out to him by Beal at the time, that he was merely endorsing the same as a director of the Bank of Grenada, and that, without such representation, and the suggestion on the part of Beal that he was not binding himself personally, he would not have endorsed the said note. He further pleaded as a bar to this action, the pendency of another suit in Mississippi, between the plaintiff and himself, on the same note, and prayed for the dismissal of this suit on the ground that the property attached herein, and whereby alone jurisdiction could be vested in the court below, was not his property, but that of the commercial firm of Chisholm & Minter, of Mississippi. The latter intervened, claiming the dissolution of the attachment, and alleging, that at the time of levying the same, and previous thereto, they were the lawful owners of the cotton seized, and are entitled to said cotton, or its proceeds in the hands of Nugent,

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Turpin & Watt; and that if they be not entitled to the cotton as absolute owners, they have a lien or privilege thereon, for loans and advances to the said C. P. Alexander, made in good faith in the State of Mississippi, and before the cotton was shipped, to the amount of \$10,000, &c. A peremptory exception was taken by the plaintiff to the petition of intervention, on the ground, that long prior to the filing thereof, the property attached had been bonded by the garnishees, and released from seizure under the condition of satisfying such judgment as might be rendered in the suit. This exception having been sustained, and judgment given below in favor of the plaintiff, both the defendant and the intervenors have appealed.

The right of Chisholm & Minter to claim the cotton, or its proceeds, by intervention in this suit, after it had been bonded, was, in our opinion, correctly disallowed. Property attached is represented by the bond given for its release, only with regard to the attaching creditor, and for the sole purpose of satisfying any judgment he may obtain in the suit; but as to third persons, who set up a claim to it as owners after it has been bonded, they must look to the property itself, which is no longer under the control of the court. 1 Robinson, 277. 18 La. 57.

As relates to the suit between the original parties, an attempt has been made to show by testimony, that at the suggestion of the plaintiff, the note was endorsed by Alexander and by one Sims, who were directors of the Bank of Grenada, without responsibility, and merely to give it a negotiable form, and a more business like appearance. But this hypothesis, so improbable and absurd in itself, is entirely inconsistent with the evidence in the case. It is shown, that the Bank passed a resolution to transfer to the defendant and Sims a sufficient number of notes to indemnify them in the sum of \$9000, for which, the resolution says, they had become liable as endorsers of two notes for the Bank, one of which is the very note sued on; and in addition to this, it is shown, that on receiving the notice of protest, the defendant wrote to the plaintiff, urging him not to bring suit against him, fully admitting his liability, and proposing to him terms of settlement.

Judgment affirmed.

JOHN W. LEAVITT, and others, Trustees of George G. Henry, v. THE WESTERN MARINE AND FIRE INSURANCE COMPANY.

Policies of insurance against fire are personal contracts with the assured, and do not pass to an assignee or purchaser without the consent of the insurers. The transfer of the policy is equivalent to a new contract of insurance with the transferree.

Where a policy of insurance provides that, "in case the insured have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in, or endorsed on this instrument, or otherwise acknowledged by them in writing, this insurance shall be void;" and a third person, to whom the property insured had been assigned and to whom the policy was transferred with the assent of the insurers, fails to notify the latter at the time of the transfer of another policy previously taken out by him on the same property, the insurers will be discharged. A declaration of the first insurance made after the loss, in compliance with a condition of the policy requiring all persons insured sustaining any loss, to declare on oath whether any and what other insurance has been made on the same property, will be too late.

APPEAL from the Commercial Court of New Orleans, Watts, J. L. C. Duncan, for the appellants cited 8 Johnson, 245. 11 Ibid. 265. 6 Cowen, 404. 4 Dallas, 350. 2 Phillips on Ins. 350.

Eustis, on the same side.

Maybin and Grymes, for the defendants.

Morphy, J. This is an action brought upon a policy of insurance against fire, executed by the defendants on the 25th of June, 1839, in favor of Vles & Co., of New Orleans, but admitted to have been made for the account of George G. Henry, on a house, stable and furniture, at Mobile. The policy was for one year, and insured \$8000 on the house, \$500 on the stable, and \$1500 on the furniture. On the 17th of September, 1839, Henry being in New York, made an assignment of property to the petitioners, in trust for his creditors, which assignment included the insured premises. On the 27th of the same month, the trustees effected an insurance on the same house for \$8500, for one month from the 17th, the day of the assignment of the property to them, in the office of the North American Insurance Company, at New York. Vles & Co., in pursuance of instructions from

the plaintiffs, obtained the consent of the underwriters in New Orleans to have Henry's policy transferred to them, which transfer was accordingly made on the 7th of October. The property insured was destroyed by fire, two days after, to wit, on the 9th of October, 1839. At the time the consent of the company was obtained, and the transfer or assignment of the policy sued on was made to the trustees, no notice was given of the existence of the New York policy; and it is admitted, that the defendants had no intimation of any such policy having been taken out, until the 13th of December following. The preliminary proof required by the conditions of the policy was not regularly made, until November, 1841. The defendants paid the loss on the furniture in March, 1840, but refused to settle for that on the house and stable assigned to the plaintiffs, on the ground that they had received no notice of the insurance effected in New York on the same property. The claim of the petitioners on the New York company was submitted to the arbitration of distinguished jurists of that city, who decided that the loss should be apportioned between the two offices, according to a stipulation to that effect contained in each of the policies. Their award has been laid In relation to the liability of the defendants, which before us. it was necessary to establish to authorize this apportionment, they reason at some length on difficulties supposed to result from the policy having been made out through error in the name of Vles & Co., instead of George G. Henry, and but slightly touch on what we conceive to be the true and only difficulty in the case. The New York company having settled with the plaintiffs in compliance with this award, the latter now claim of the defendants their proportion of the loss.

The defence set up is: First, the want of early notice of the loss, and of the preliminary proof required by the conditions of the policy: Secondly, the failure of the insured to give notice to the company of the New York policy, which they had taken out on the same property. We have found it unnecessary to inquire into the sufficiency of the preliminary proof, or its waiver on the part of the company, as, in our opinion, the second ground of defence on which they rely, must prevail.

The policy sued on provides that, "in case the insured have

already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or endorsed on this instrument, or otherwise acknowledged by them in writing, then this insurance shall be void and of no effect; and if the insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect."

Policies against fire are personal contracts with the assured, and they do not pass to an assignee or purchaser, without the consent of the underwriters. Between the 17th of September, 1839, when the insured property was assigned to the plaintiffs, and the 7th of October following, when the policy was transferred to them with the approbation of the company, it did not cover the property. Had a loss occcurred during that time, the defendants would clearly had been discharged. Henry could not have claimed, having parted with all his interest by the assignment; and the petitioners could not have recovered, because they were not parties to the contract of insurance. The transfer of Henry's policy to the plaintiffs, with the consent of the company, on the 7th of October, was equivalent to a new insurance, or contract with them. Before, or at the time of receiving such transfer, they were bound to notify the defendants of the prior policy made in New York, and at that time covering the property. When the assignees or trustees sent out orders to obtain a transfer of the New Orleans policy, which they appear to have done on the very day they had effected an insurance in New York on the same property, there was nothing to prevent them from directing their correspondents, Vles & Co., to notify the underwiters of such insurance, and to have it endorsed on the policy transferred to them. By their neglect to do this, the transfer of the policy, if viewed as a new insurance, never took effect so as to protect them from loss. If, although the policy sued on was at an end on the 17th of September, 1839, by the assignment of the property insured, it be considered as a prior policy, and the New York policy as a subsequent one, the obli-Vol. VII. 45

gation to give notice of the latter policy with reasonable diligence. was the same, and they had ample time to do it between the 27th of September and the 9th of October, when the fire occurred: but no notice whatever was given until the 12th of December following. This difficulty was not in the way of a settlement with the New York company, as at the time they insured, there was no available policy in existence to be declared; and only two days elapsed between the transfer of Henry's policy in New Orleans to the plaintiffs, and the fire which destroyed the premises insured. In relation to the ninth condition of the policy, to which our attention has been called, it is clear, that the declaration to be made by the insured of other insurances existing on the property is a part of the preliminary proof, and does not relate to the notice to be given of prior or subsequent policies. surance offices generally require it to secure themselves the means of ascertaining, after the fire, whether other insurances existed on the property. This knowledge, in most cases, they can obtain only from the insured himself. Until this declaration is made, they have a right to withhold payment; but if it appears from such declarations, when made, that other policies existed not notified to them, they can absolutely refuse to pay. This declaration cannot surely supply the notice not previously given in accordance with the conditions of the policy. These conditions are clear and explicit; by failing to comply with them, the petitioners have forfeited their right to recover. 3 Robinson, 384. 1 Phillips. 16 Wendell, 400. 5 Hammond's Ohio Rep. 466. 16 Peters, 510. The present case is one of some hardship, as the plaintiffs, no doubt, acted in good faith. Their object was clearly to effect a temporary insurance until they could obtain a transfer of the assignor's policy, or be apprised whether it was granted or refused. But they can blame only themselves, or their agents in New Orleans, as it was easy for them to comply with the conditions of the policy. If notice of a prior policy for a period of one month can be withheld, notice of a policy for one vear might also be dispensed with. In the case of Carpenter v. The Providence and Washington Insurance Company, the Supreme Court of the United States, in speaking of these conditions of the policy, say: "We see no reason why, as these clauses

Halsey and others v. Voorhees.

are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation, according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract. Upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations, which, but for those stipulations, would not have been entered into." 16 Peters, 511.

Judgment affirmed.

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JOSEPH A. HALSEY and others v. MARCUS T. VOORHEES.

Where the facts of a case appear only from a statement made by the judge, and there is no assignment of error or bill of exceptions, no point of law can be examined which does not arise from the facts stated by the judge; nor can the allegation of any fact not found in such statement be attended to.

Appeal from the Commercial Court of New Orleans, Watts, J. H. D. Ogden and Hoffman, for the plaintiffs.

Eggleston and Elwyn, for the appellant.

MARTIN, J. The defendant is appellant from a judgment against him. The parties not having agreed on a statement of facts, the case is before us on that made by the Judge, a quo, as follows: "The transactions of the plaintiffs commenced with the house of Smith & Voorhees. When that house was dissolved, it was agreed that Voorhees should take charge of the unfinished business, liquidate its accounts, pay its debts, and succeed to its business. The plaintiffs had an agreement with Smith & Voorhees, according to which only one half the usual commissions were to be charged for collections from the debtors of the plaintiffs, and for other business. The other items of he plaintiffs' account were also proved to be correct. All the testimony on the above points was given by E. Smith, the former partner of Voorhees, whose testimony was clear, and as it appeared to me entitled to full belief. Voorhees admitted the agreeRush v. Bouligny.

ment between the plaintiffs and Smith & Voorhees to be as stated, but insisted that he was not bound by the agreement, but was entitled to charge full commissions. He also insisted on a full commission on a note which had been sent to an attorney in the country, and for which some collateral security was received, but which was never collected by him, but turned over to the plaintiffs.

"The whole is a matter of account between the parties, and was referred to Mr. Calhoun, Comptroller of the Second Municipality, as sole auditor; and his report, not having been approved by the defendant, was confirmed by the court. The witness Smith having been heard on the opposition, his testimony sustained the account as reported."

The defendant and appellant has put the case before us on facts somewhat different from the above, and has complained of the judgment as being grounded on illegal and insufficient evidence; but as there is no assignment of error, nor bill of exceptions, we are unable to examine any point of law that does not arise from the facts in the Judge's statement, or to attend to the allegations of any fact not found therein. It is clear the Judge did not err.

Judgment offirmed.

PATRICK RUSH v. URSIN BOULIGNY.

Appeal from the Commercial Court of New Orleans, Watts, J. Larue, for the appellant.

Preaux, for the defendant.

Morphy, J. The plaintiff has appealed from a judgment rejecting a claim he sets up against the defendant, for services rendered as a deputy sheriff of the Criminal Court of this city, from April to November, 1842. The evidence exhibited by the record, appears to us to sustain fully the judgment complained of. It shows conclusively, that the plaintiff, who had been employed by the defendant's predecessor as a constable, or deputy sheriff, in

the Criminal Court, was permitted by the defendant, at his own repeated solicitations, to remain and serve without pay until a vacancy should occur among the four constables, or deputy sheriffs, in attendance on that court, and among whom was divided the allowance of \$3 for three constables, which the law gives to the Sheriff for every day the Criminal Court sits; that, in case of a vacancy, the plaintiff was to have a share of such legal allowance; but that the defendant never agreed or intended to render himself personally responsible to the plaintiff, whose services he was not in need of; and that no vacancy occurred, during the period of time for which he claims a remuneration.

Judgment affirmed.

VILLARSOT MACARTY v. ANNE ROACH and another.

A married woman, whether separated in property or not, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him during the marriage, (C. C. 2412); and when sued on such a contract, she may show by parol evidence, that she was only a surety, though such evidence expressly contradict her own declarations in an authentic act.

Where in an action against the maker and endorser of a note, the maker pleads that she was a married weman at the time of executing the note, which was signed by her as surety for her husband, and that she was in no way benefitted by the consideration received therefor, and the endorser answers separately but adopts the defence set up by his co-defendant, he cannot be examined as a witness for the latter to establish the facts alleged in her answer, being interested in destroying her obligation as maker.

The endorser of a note is a competent witness for the maker where the facts attempted to be proved by his testimony have no tendency to affect his responsibility, nor to change, as to him, the ultimate result of the suit.

The act of 27 March, 1823, so far as it renders the maker of a note, bill of exchange, or other negotiable paper incompetent, under any circumstances, in any action by the holder against an endorser, was repealed by article 3521 of the Civil Code.

A father is incompetent as a witness for his illegitimate child. C. C. 2260. Per Curiam: The mere fact of a witness being the ascendant of the party for or against whom he is called, is sufficient to render him incompetent. The law makes no distinction as to fathers by legal marriage or otherwise.

APPEAL from the District Court of the First District, Buchanan, J.

C. Janin and De Courmont, for the plaintiff.

W. S. Upton, for the appellants.

Simon, J. This is an action against a married woman, as drawer of a note for \$1500, executed by her with the authorization of her husband, and secured by a special mortgage on certain property described in the act alluded to in the plaintiff's petition, and against the endorser of the note, which appears to have been duly protested for non-payment at maturity.

The defendants pleaded various exceptions which were overruled; after which they filed separate answers, in which it is set up, that when the defendant, Anne Roach, signed the note sued on, she was a married woman; that the note was given for a debt of her husband's contracting, viz., to enable him to fulfil a contract entered into by him with Municipality No. 1, for the paving of Bourbon street; and that such an obligation is not one which she is bound by law to pay. She further states, that she only signed the note as surety for her husband, which, by aw, she could not do; that she was in no manner benefitted by any part of the consideration received for said note; and that it was not for her own separate use and advantage, nor for anything which her husband is not bound to furnish.

There was judgment below in favor of the plaintiff against both defendants, in solido, from which the defendants have appealed.

It appears from the recital of the act of mortgage, that Anne Roach declared herself therein as being truly indebted to the mortgagee in the sum of \$1500, being the amount of a loan made by the latter to the mortgagor, and that nearly the whole amount of the loan was appropriated to the payment of the several mortgages therein described. The mortgagor was separated in property from her husband, who appeared in the act to authorize his wife to contract, and, so far as the stipulations contained in the act go to establish the consideration of the note sued on, and the manner in which the money said to have been loaned was invested, it would appear that the debt was contracted for the mortgagor's use and private benefit. But this is denied by the

defendants, who have attempted to show by the evidence of François Cheti, one of the persons who signed the act, that upon the note described therein as for \$1000, drawn by Mrs. Roach, to his order, dated the 26th of March, 1839, payable one year after date, said François Cheti did not receive one thousand dollars out of the money purporting to have been loaned by said act in payment of said note, but in fact only received one hundred dollars; and that this last sum was, at the date of said act, the only balance due on the note, which balance was paid. This evidence was rejected by the Judge, a quo, on the ground that it would go to contradict an authentic act; and the defendants took a bill of exceptions.

We think the District Judge erred. The object of the evidence was, to establish that the money which appeared, from the act to have been loaned to the mortgagor, was not vested in the manner recited in that act; that the amount therein stated to have been paid to Cheti in discharge of the mortgagor's debt, was not paid, but in point of fact was received by the husband, for whose benefit the loan was obtained and the mortgage given; and that the truth was, that this form of contract was adopted merely for the purpose of evading that provision of our Code which incapacitates the wife, whether separated in property or not, from binding herself for her husband, or conjointly with him, for debts contracted by him during the marriage. Civ. Code, art. 2412. This case is analogous to that of Pilie v. Patin and Husband. 8 Mart. N. S. 692, in which, after a full consideration of the question, the principle is plainly recognized, that the wife sued as principal, may show, by parol evidence, that she was only surety, although it would expressly contradict her declarations in an authentic act. The reasoning of this court appears to us conclusive: "When certain persons, such as married women, are incapacitated from contracting engagements of a particular kind. any stipulations obtained from them contrary thereto, are in fraudem legis; and if it were not open to them to show the real nature of the transaction, the laws made for their protection would have no effect." See also 5 Mart. N. S. 54, and 7 Ib. N. S. 341, in which it was held that, "when the law incapacitates persons from making contracts of a particular kind, its provisions

cannot be evaded by giving to these contracts a different form from that forbidden by law, when, in substance, the contract is that prohibited." It is, therefore, clear, that the proof offered should have been received.

The defendant, Anne Roach, also complains, that the testimony of her co-defendant, Holbert, who had made a separate answer, offered by her to prove that all the money received on the note sued on did not amount to more than \$800 or \$900, and that the whole of it was paid to her husband for certain purposes as set out in the answer, was rejected by the court, a qua, on the ground that the witness was interested in destroying the obligation of the maker of the note, on which he, the witness, is endorser. In this we think the District Judge did not err. It is true, the endorser of a note is a competent witness for the maker for certain purposes, wherever the facts sought to be proved by his testimony have no tendency to affect his responsibility, or to discharge him from his obligation, or to change, as to him, the ultimate result of the suit. 3 Mart. 659. 9 Ibid. 465. 5 Ibid. N. S. 142. 8 Ibid. N. S. 508. It is also true, that the act of 27th of March, 1823, so far as it renders the maker of a note, &c. an incompetent witness in an action against the endorser, is repealed by article 3521 of the Civil Code. See 19 La. 584, and the case of Johnson v. Marshall and another, 4 Robinson, 157. But here, the evidence rejected was introduced in support of the defence set up by both defendants. The defendant, Holbert, pleaded separately; but he adopted the very defence relied on by his co-defendant, and pleaded the same facts in answer as those set forth by Mrs. Roach. His testimony was properly rejected, as he could not testify in his own favor.

The record contains a third bill of exceptions, to the opinion of the court rejecting the testimony of Eugene Macarty, who was introduced as a witness by the defendants, and who, after being sworn, stated that he was the plaintiff's father. After an objection made by the plaintiff's counsel to the competency of the witness under article 2260 of the Civil Code, it was discovered that the plaintiff was a man of color, and that, therefore, the witness, who was a white man, could not be his legitimate father under our laws. Civ. Code, art. 254. Whereupon the defen-

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dants insisted, that his testimony should be received, but the Judge, a quo, thought otherwise, and we think he decided correctly. We agree with him in the opinion that the law makes no distinction as to fathers by legal marriage or otherwise; and from the terms of the article above quoted, it seems that the mere fact of the witness being the ascendant of the party, for or against whom he is called on to testify, is sufficient to render him incompetent. The exclusion is based upon the bias which would naturally and necessarily exist in the mind of the witness; and it must apply as well to natural as to legitimate children. 5 La. 96.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed; and that this case be remanded to the lower court for a new trial, with instructions to the Judge, a quo, not to reject the testimony of François Cheti, nor that of any other competent witness introduced in support of the defence set up by Mrs. Roach; the plaintiff and appellee paying the costs of this appeal.

GEORGE WHITMAN v. HORACE C. CAMMACK, Assignee of Kohn, Daron & Co., Bankrupts.

APPEAL from the District Court of the First District, Buchanan, J.

Durant, for the appellant.

T. Slidell, for the defendant.

Bullard, J. Among other assets surrendered by Kohn, Daron & Co. to their creditors, was an account against Martineau, Cruger & Co., stated in the schedule to amount to \$22,254 62. dit, as well as others belonging to the bankrupts, was sold by the Marshal of the United States for the Eastern District of Louisiana, and George Whitman, the present appellant, became the purchaser for the price of \$140. Thereupon the assignee. Cammack, gave him a written certificate of purchase, which recites the purchase at the Marshal's sale of "an account against Martineau, Cruger & Co., for \$22,254 62," and then goes on to say, that in consideration of the sum of \$140, the assignee trans-Vol. VIL

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fers to the purchaser, "all claims of every nature and kind whatsoever, which the said Kohn, Daron & Co. had against Martineau, Cruger & Co., subrogating him in their place and stead."

It appears in evidence, that Kohn, Daron & Co. having a judgment against Martineau, Cruger & Co., had proceeded by garnishment against Bushrod Jenkins, a debtor of the latter house, and obtained a judgment against him, in November, 1840, for \$4560 19, which being deducted from the original amount, left the balance of \$22,254 62, set forth in the schedule, and that the judgment thus obtained against Jenkins was, in 1842, transferred to H. M. Shiff, by Kohn, Daron & Co., previously to their going into bankruptcy. This judgment was after the bankruptcy, re-transferred to their assignee.

Under these circumstances Whitman, under his purchase at the Marshal's sale, claims to be the owner of the judgment against Jenkins, as a part of the claim against Martineau, Cruger & Co. This question was presented on cross rules taken by the claimant, Whitman, and by Cammack, the assignee, not in very clerical and technical form, but to which informality neither party excepts; and the judgment being adverse to the pretensions of Whitman, he has appealed.

The court did not err. Independently of the parol evidence, received without opposition, and of the testimony of the witnesses who were objected to, it is shown that, at the time of the surrender of Kohn, Daron & Co., they were not owners of that part of the original claim for which they had obtained a judgment against Jenkins. It had been transferred to Shiff. balance only was assigned for the benefit of the creditors, and embraced in the schedule. The Marshal's sale was made with reference to the schedule; and we are to consider that nothing was sold which was not therein set forth. Although the amount for which judgment had been obtained against Jenkins, formed originally a part of the claim against Martineau, Cruger & Co., yet so much of that debt had merged in the judgment, and formed a distinct object or piece of property. The arrangements entered into with Jenkins were such as to amount to a novation. and quoad the original debtors, Martineau, Cruger & Co., they had a right to insist that their original debt was extinguished

pro tante. That judgment, in our opinion, did not pass by the Marshal's sale; but when it was re-transferred by Shiff to the assignee, it was for the benefit of all the creditors. Kohn, Daron & Co. had already given credit for that amount, and thereby treated it as a payment; for, in their schedule, they put down only the balance as a part of their assets; and the same amount is set forth in the account of the Marshal's sale. The fact that the re-transfer took place before the Marshal's sale, does not alter the case, inasmuch as the sale was made with reference to the schedule.

This view of the case makes it unnecessary to examine the bills of exceptions taken during the progress of the trial.

Judgment affirmed.

WILLIAM SWAN Toole and another v. John Durand and another.

Action against defendants, who had guarantied plaintiffs against any loss they might sustain as sureties on bonds for the payment of duties, to recover the amount of certain bonds which they had been compelled to pay, with interest. Held, that plaintiffs were entitled to recover the amount of the bonds paid by them, with interest thereon at six per cent from the time of such payment. Act of Congress of 2 March, 1799, § 65.

APPEAL from the Commercial Court of New Orleans, Watts, J. L. Janin, for the plaintiffs.

Eustis, for the appellants.

BULLARD, J. The facts which led to this controversy are substantially: That John Durand, of Bordeaux, who is also a partner in the house of Durand & Co. of New York, had consigned to Barthet & Co. of this city, for sale, at different times, a quantity of brandy and wines, and that the plaintiffs, Toole & Barriere, became the sureties of the consignees on the Custom-House bonds given for the duties. That Durand & Co. of New York finding that Barthet & Co. were embarrassed, sent their agent, Dupuy, to withdraw from their hands what might remain unsold of the consignments. The brandy and wines were consequently taken

by Dupuy, and put on board a ship for New York, when Toole & Barriere interfered, threatening to have them attached in order to save themselves. Under these circumstances, the agent having taken sundry notes from Barthet & Co. for the balance found due to his principals, writes to Toole & Barriere, on the 6th July, 1839, that he incloses to them those notes amounting to \$4696 10. which he requests them to collect for the account of John Durand & Co. of New York, giving them advice of their payment, and to follow the instructions of that house. He goes on to say, that, on his arrival at New York, he will cause to be addressed to them a letter by Durand & Co., to guaranty them against all loss which they may sustain in consequence of their having signed the Custom House bonds for duties on the merchandize consigned by John Durand of Bordeaux, to Barthet & Co., by the ships Meridian, Cardinal de Cheverus, Lubeck and Indiana. He adds, it is understood that you will neglect nothing to prevent such a loss being sustained. The notes were drawn to the order of Dupuy, and endorsed by him. They were signed by Barthet & Co., then in liquidation. On the same day, Toole & Barriere acknowledge the receipt of the notes, which they say they will retain for collection, and at the same time as collateral security, until those gentlemen give them a guaranty against the loss they may sustain as sureties on the Custom House bonds.

On the return of Dupuy to New York, Durand & Co. wrote to the plaintiffs a letter dated August 9th, 1839, in which they say, that Dupuy had furnished them a copy of their correspondence of the 6th of July. After stating the amount already paid by Toole & Barriere, to wit, \$3882 18, and the bonds yet to be paid, and stating a balance due to them of \$4788 08, they add: "To guaranty you against any loss which you might sustain in consequence of your endorsements for that amount, he handed over to you as collateral security the following notes of Barthet & Co., (detailing them.) amounting to \$4696 10, of which we pray you to make collection as they fall due, and remain possessors of those sums until the house of Barthet & Co. shall have discharged the above stated balance of \$4738 08; approving the arrangements (les dispositions) which Mr. Dupuy entered into with you in that view (à cet &gard.) and in order to guaran-

ty you against all loss which might result from your endorsements at the Custom House on the bonds arising from the consignments of our house in Bordeaux to Barthet & Co., it being well understood that you neglect no means to reimburse yourselves from that house. We write to day to that house, to urge them to furnish you as soon as possible, security for the ulterior payment of those duties in order to annul the guaranty which you have obtained from Mr. Dupuy."

The notes of Barthet & Co. not having been paid, and the plaintiffs alleging that they had been compelled to pay the remaining bonds, the present action was brought against John Durand and John Durand & Co., to recover the amount of their advances. The plaintiffs found their right to recover not only upon the guaranty given by the New York house, but upon the fact, that they became sureties on the Custom House bonds for the benefit of the consignor, John Durand of Bordeaux, and that in substance they acted from the beginning as his negotiorum gestores. They allege, that notwithstanding their diligence, they have recovered nothing from Barthet & Co.; that they had obtained a judgment against them; and that the execution issued thereon had been returned, no property found.

The case was tried by a jury who found a verdict in favor of the plaintiffs for the amount claimed by them, which, after an ineffectual effort to obtain a new trial on the part of the defendants, was followed by a judgment, from which the latter have appealed.

Two principal questions have been discussed in this court. First, whether the letters of Dupuy and of Durand & Co., amount to a guaranty in favor of the plaintiffs, and a promise to reimburse them what they had paid, or might afterwards pay as sureties on the bonds. Second, whether that guaranty was upon the condition that the plaintiffs would use due diligence in collecting the notes of Barthet & Co., and whether they have lost their right to recover by their want of diligence.

I. The letter of Dupuy contains an unequivocal promise to obtain from the house in New York a guaranty to Toole & Barriere. The consideration for this promise was, that the latter abstained from seizing the goods for the duties upon which the bonds had

been given, and a large amount already paid by Toole & Barriere. It appears that about \$6000 worth of the merchandize remained, which, in consequence of this arrangement, Dupuv forwarded to New York. In his letter, he says nothing of the notes of Barthet & Co. forming any part of the promised guaranty. He simply leaves them for collection in the hands of the plaintiffs, subject to the instructions of Durand & Co., adding, however, that it is understood that Toole & Barriere are to do all they can to avoid any loss resulting to them from their endorsement of the bonds. It is in the answer of the plaintiffs to this letter that the collateral security is first spoken of; they say they will retain the notes for collection, and at the same time as collateral security until the guaranty shall be given. They seem to have understood, that the notes should be regarded only as provisionally a collateral security, until Dupuy should have complied with his promise to obtain the letter of guaranty from Durand & Co. That letter has already been mentioned, and its substance given. Although Durand & Co. appear to have understood that the notes of Barthet & Co. formed a collateral security, yet they approve what was done by their agent, at the same time observing, that it was well understood that Toole & Barriere should neglect no means to secure themselves from Barthet & Co.

We cannot suppose that any of the parties considered the notes of Barthet & Co., which were placed in the hands of the plaintiffs for collection, as forming their only security. At most they were collateral, thereby implying a principal obligation to which they were accessory. Toole & Barriere became the agents of the defendants to collect, and were authorized to retain the amount, when collected, in order to reimburse themselves.

II. Although the guaranty thus given was not, strictly speaking, upon the condition that the plaintiffs should collect the notes of Barthet & Co., yet there is no doubt they undertook as mandataries to collect them, and are responsible as such for any loss which the defendants may have sustained in consequence of their fault or neglect. We are, therefore, to inquire, what diligence was used, and whether the plaintiffs have rendered themselves liable for the amount of those notes, as if this were a direct action against them. It appears that the first note for \$1700,

was protested on the 12th August, 1839, and Durand & Co. were immediately informed of it, and charged with the costs of protest. They acknowledge this by letter dated the 2d of September, and say that Toole & Barriere are credited with those costs, at the same time praying them not to lose sight of the debt due by Barthet & Co. In the course of the same month, two Custom House bonds fell due amounting to more than eighteen hundred dollars, which the plaintiffs were compelled to take up. The three notes which fell due successively in September, October and November, of about a thousand dollars each, were not protested: but it appears demand was made, and that the drawers were unable to pay them. It would appear from a letter of the 16th December, 1839, that Durand & Co. had been regularly informed of the steps taken in relation to the notes of Barthet & Co., for they say: "Please accept our thanks for the trouble you have taken, as likewise for your communications respecting Barthet & Co.'s settlement. You were perfectly right in refusing Mr. Bergeron's part, although it proves his desire to do us justice." They then go on to say, that they had received a letter from Bergeron stating, that a part of the disbursements for Custom House bonds had been paid, and that there was shortly to be a final settlement. They ask some explanation on the subject, "because." they say, "as soon as they have settled this irregular business with you, we may then endeavor to obtain something on account of our notes remaining in your hands." Toole & Barriere were to follow the instructions of Durand & Co., in relation to the collection of those notes. The letter just mentioned, dated after all the notes had fallen due, is far from giving any instructions to bring suit; and the neglect to have the last notes regularly protested did not impair in the slightest degree the liability of the drawers, although it did release the endorser, who was in fact the agent of the plaintiffs. On the 30th of November, Toole & Barriere write to the New York house: "In regard to the affairs of Barthet & Co., we can give you no further hopes for the present than Mr. Barthet's promises. We think that, at this moment, you will not be able to obtain anything; but that in the course of six or eight months he or they will pay up." The house in New York made no objection to the proposed delay. Finally, in the

spring of 1841, suit was brought on the notes, and judgment recovered on the first of April; and the execution which issued soon afterwards was returned nulla bona.

But it is argued, that Barthet & Co. were at the same time indebted to Toole & Barriere, and that the latter received in payment a large amount of bank stock and several city lots. It appears, however, that those transactions took place before the arrangement with Dupuy, and the giving of the guaranty. At that time Toole & Barriere had a right to look to the merchandize, to reimburse to them the duties they had paid as sureties on the bond; and, according to the late bankrupt law, were entitled to a priority of payment out of the whole property of the principals in the bond, in case of their failure.

It is in evidence that repeated efforts were made to obtain payment of the notes before bringing suit; and that, although Barthet was largely indebted to Toole & Barriere, they collected nothing. No instructions were given to bring suit; and it is not shown that any damage resulted to the defendants from the delay, in which they seem to have acquiesced, by not instructing the plaintiffs to bring suit sooner.

This view of the case is wholly independent of any original liability of Durand or Durand & Co. to refund to the plaintiffs what they may have paid as sureties of Barthet & Co., the consignees; and places their liability on the guaranty promised by Dupuy, and ratified by the defendants. The authorities cited by the defendants' counsel would be strictly applicable, if the plaintiff sought to recover of the owner, independently of any such engagement. The consideration of the promise to indemnify the plaintiffs was, that they permitted the defendants to withdraw \$6000 worth of the goods on which they had paid the duties, and which, so far as the government and the sureties were concerned, were to be considered as the property of the consignees.

We are of opinion, that interest at six per cent was properly allowed, according to the laws of the United States; and, upon the whole, the question of diligence having been submitted to the jury, we are not satisfied that it becomes our duty to disturb their verdict.

Judgment affirmed.

WILLIAM E. THOMPSON v. JOHN L. LOBDELL.

An attorney at law is responsible for any injury resulting from his neglect of business entrusted to him. Thus where an attorney employed by the administrator to prepare and file a tableau of distribution of the effects of a succession, neglects to avail himself of the means of obtaining correct information, but prepares, and without submitting it to the administrator, files a tableau by which the balance in the hands of the latter is represented as much larger than it really is, and, after the errors are pointed out to him by the administrator, neglects to have it corrected, and the tableau is finally homologated, he will be responsible for the injury which the administrator may sustain in consequence of such neglect. Nor will it be any defence to an action against him to allege, that if the administrator were charged with interest on the sums which had remained in his hands, the balance represented by the tableau would not exceed the amount really due to the succession, he having no right to benefit by a debt, which, if it exist, is owing to the creditors or heirs of the estate.

Where, through the negligence of an attorney in preparing a tableau of distribution of the effects of a succession, the administrator is made liable, by its homologation, for an amount larger than was really due by him, and proceedings are subsequently commenced for correcting the error, after the termination of which the amount so represented to be due is collected, under execution, from the administrator, prescription will run in favor of the attorney only from the date of the actual payment by the administrator.

APPEAL from the District Court of West Feliciana, Johnson, J. This was an action to recover from the defendant \$9305 59, which the plaintiff alleges that he was compelled to pay in consequence of the negligence of the defendant in the management of business, with which he was entrusted as an attorney at law. The facts of the case are stated at length in the opinion of Garland, J. There was a judgment in the lower court in favor of the defendant, from which the plaintiff appealed.

W. M. Randolph, for the appellant. The law applicable to this case may be found in Story on Agency, §§ 217, 219, pp. 170, 174, 177, 186. 3 Partida, tit. 5, law 26. Bullard & Curry's Dig. 21. 9 Mart. 371. Millaudon v. McMicken, 7 Mart. N. S. 38. Civ. Code, arts. 2294, 2295. Evans' Pothier, No. 121. Plaintiff having established the loss sustained by him, it is for the defendant to prove due diligence. 11 Mart. 192. 6 Ibid. N. S. 195. 8 Ibid. N. S. 328. See also, as to the responsibility of attorneys, 4 B. & Ald. 202. (6 Eng. Com. Law Rep. 401.) 1 Bingham, Vol. VII.

344, (8 Eng. Com. Law Rep. 341.) 3 Barn. & Cress. 799, (10 Eng. Com. Law Rep. 332-6.) 10 Bing. 491, (25 Eng. Com. Law Rep. 218-9.) Gilbert v. Williams, 8 Mass. 57. 2 Chitty's Rep. 311, (18 Eng. Com. Law Rep. 348.) 7 Bing. 413, (20 Eng. Com. Law Rep. 183.)

The prescription of one year established by art. 3501 of the Civil Code does not apply. The injury sustained by the plaintiff was not the result of any offence or quasi-offence on the part of defendant. The neglect of duty by an attorney is a breach of an implied contract—not a tort. Pothier, Obligations, 113. But if the prescription of one year be applicable, it commenced to run only from the date of the judgment of the Supreme Court refusing to permit the errors in the homologated tableau to be corrected—not from the time of filing the tableau. Had the judgment on the appeal allowed the tableau to be corrected, plaintiff would have had no cause of action.

Bowman, Thomas, and J. P. Bullard, on the same side.

Lobdell, defendant, pro se. There was no neglect on the part of defendant. Nor has the plaintiff sustained any injury, being liable to the heirs, for interest on money in his hands, to an amount exceeding the erroneous balance stated in the tableau of distribution. Thus the amount received by the heirs under the tableau, not being more than they were justly entitled to, plaintiff could not recover from them the erroneous balance stated in the tableau; and, consequently, the defendant, should he be condemned to pay the amount sued for, though subrogated to plaintiff's rights, will be without any remedy against the heirs. Lastly, the claim is prescribed. Fisk v. Browder, 6 Mart. N. S. 691.

Johnson and Z. S. Lyons, on the same side, cited Civil Code, art. 2972. 1 Martin's Dig. 528. 9 Mart. 353. 11 Mart. 192. 6 Mart. N. S. 195. S Mart. N. S. 328. 9 La. 422, 559. 11 La. 137. 8 Mass. 51-7. 11 Johnson, 547. 15 Ibid. 231. 9 Cowen, 57. 3 Day's Com. Law Rep. 390. 2 Abridg. Am. Com, Law Cases, 33-7. Story on Agency, 160, 170, 186, 210, 213.

GARLAND, J. This action is brought to recover from the defendant, who is an attorney and counsellor at law, the sum of \$9305 59, which the plaintiff alleges he had to pay improperly

and without cause, in consequence of the neglect, mismanagement, and want of skill and attention, on the part of the defendant, whom he had employed to transact his business. The petition contains, at great length, various allegations which go to charge the defendant with the various acts said to have caused the loss and damage.

The answer, after a qualified denial of all the allegations, proceeds by an admission, that the respondent was retained and employed in his professional capacity to advise and direct the plaintiff touching and concerning the administration, liquidation and settlement of the succession of F. A. Browder, late of the parish of East Baton Rouge, as he was also by the late John Linton, who was the predecessor of the plaintiff in administering the affairs of said succession; but he avers, that he was not the only legal adviser of Linton and the plaintiff, they having employed others, under whose directions and advice much of the business was conducted, without his sanction or knowledge. He specially denies having withheld from the plaintiff the tableau of distribution alleged to have been filed by him on the 30th of November, 1837. or that it was unnecessarily filed; but alleges, on the contrary. that he did shortly after it was filed forward to him a statement of the same, at which time, if there had been any errors committed by him, the plaintiff had it in his power to correct them. further avers, that he furnished the late John Linton with the form of a legal tableau of distribution of the estate of Browder, to be filled up according to the respective rights and privileges of the creditors; but that the plaintiff disregarded said form, and filed accounts and statements, through other counsel, partial, confused, and hard to be understood, paving no regard to the order and rank of the creditors, and without naming many of the ordinary creditors at all. He further avers, that at the time of filing the tableau made by him, it was necessary and proper, as the plaintiff had long been in possession of the funds of the succession of Browder, to the great injury of the creditors, who were threatening to institute suits against the plaintiff for neglect of duty towards them and the succession, and that some of them had commenced proceedings to compel the filing of an account and distribution of the proceeds of the estate. For further an-

swer he alleges, that if the plaintiff has really sustained any loss in consequence of the homologation of the tableau filed, or from the manner in which the succession has been settled, which damage is denied, it has arisen exclusively from the desire of the plaintiff, in contravention of his duty, to retain and use for his own profit the funds of the succession, and from his inattention and neglect to furnish to respondent the true state of his and the former administrator's accounts of their administration; and that if an interest account should be entered into between the plaintiff and the succession, it would be found that, in fact, no loss has been sustained by the homologation of said tableau.

It appears that, in the month of August, 1832, John Linton was appointed administrator of the estate of F. A. Browder, deceased, and that on the same day he filed an account of the receipts and expenditures of the succession; from which it is to be inferred he had been previously appointed, and had been acting. preparation, filing and homologation of this account, it does not appear that the defendant had any agency, further than to furnish a statement, (with the vouchers in support of it,) of his acts as counsel or agent, in the part of the country where he resided. In October, 1834, the plaintiff was appointed administrator of the estate, and about the last of March, 1836, he filed, in the Probate Court of East Baton Rouge, what is called a distribution of the estate of Browder, and also an account, the whole of which is rather an account of receipts, payments and expenditures, than a statement of debts and a distribution of funds collected. It includes a number of items, dated previous to the appointment of the plaintiff as administrator, and, therefore, debits and credits which properly belonged to the administration of Linton. This statement, or account, is signed by the plaintiff, and it is not shown what precise connection the defendant had with it. It is not shown that he filed it, or had it homologated, although it appears that he was the only agent, and principal attorney in that part of the State where the proceedings were carried on, and acted This fact is shown by the correspondence as such afterwards. of the parties, and by other evidence. On the 18th of November. 1837, the plaintiff writes to the defendant, saying that he had hoped, before that time, to have given some attention to the affairs

of Browder's estate, and to have been with defendant at Baton Rouge, to arrange the additional tableau for which he (defendant,) had the documents. A desire is expressed to hear from defendant on the subject. The plaintiff then says, that one of the creditors was importunate in relation to a certain claim, but that he would prefer having the tableou completed before he paid any more money. Inquiries are then made as to the intentions of the defendant to visit the city, and in relation to the business of the succession. He then says, it would not be perfectly convenient in such times to pay all the money, but a desire is expressed to have every thing arranged, and in order to settle the estate as soon as monetary matters are a little more easy. On the 22d of the same month, the defendant acknowledges the receipt of this letter, and says that he had been called upon sometime before to know when the final tableau would be filed, and had answered that it was made out, but could not be filed until he (defendant,) had consulted with, or heard from the plaintiff. After answering several inquiries that had been made, the defendant adds, that he has been sick, but will be in the city in a few days, and will bring the tableau with him. He recommends that it be filed and homologated at once, to stop the clamor of the creditors, and states that plaintiff can get as much time afterwards as he might wish. There is reason to believe that the defendant came to the city about the time he mentioned, and it is probable that he and the plaintiff had some communication on the subject, but of its precise character the record does not inform us. This tableau purports to be dated in New Orleans on the 1st day of December, 1837, and is signed by the defendant as attorney for the plaintiff; but was filed in the clerk's office at Baton Rouge on the 30th of November, 1837. On the 15th of December, the plaintiff writes to the defendant, complaining that he had not received a copy of the tableau which was promised to be sent to him. He says, "I feel a good deal in the dark," and prays that his request may be heeded. He speaks of having written to the Probate Judge for copies. He says that he does not know how the blanks have been filled, He then proceeds to make inquiries about various matters relating to the collection of debts owing to the estate, and whether any provisions had been made to prevent the creditors from com-

ing upon him before he has funds, and trusts that proper precautions will be taken. On the 23d of December, 1837, the defendant writes, that he has been so much occupied as not to have time to make out a complete copy of the tableau in question. That only four blanks existed, and he had filled them with vari-He then proceeds to make a statement of the affairs of the succession, without pretending that it is a copy of the tableau. After answering various inquiries as to collections, he proceeds to say, that he has "a draft of the tableau," which he will bring with him when he visits the city, and leave it for examination, if the copy from the Probate Judge should not, in the meantime, be received. He then states that an opposition has been filed; that it is his intention to go to Baton Rouge; and that if there be no other opposition, he will have the proceedings homologated. Here the written correspondence between the parties ceased until the 4th of April. 1838. It is not shown that the defendant went to Baton Rouge to attend to the business, at any time previous to the 19th of April 1838, nor does it appear precisely when he came to the city with the draft of his tableau: but one witness. a clerk of the plaintiff, swears that he heard a conversation between the parties, about the 9th of January, 1838, in which the plaintiff told the defendant that there were errors in the tableau. and that he seemed convinced there were. No one was present at the conversation but the parties to this suit, and the witness. It is further shown, that a second opposition was filed, involving a considerable sum of money; and that the defendant had made an agreement with the counsel who presented it to go with him. at some period not precisely shown, to try it; but that about the 20th of February, 1838, a privileged creditor, and the gentleman to whom defendant had handed the tableau to have it filed. moved the court to dismiss this opposition, as it was not prosecuted, and had the tableau homologated.

From what has been stated, we are satisfied that the making of the *tableau* had been a subject of consultation previous to the filing of it in court, and we believe the plaintiff knew it was to be filed previously to the time it was; but the evidence does not satisfy us that he was fully aware of its contents. From the anxiety shown to get a copy of it, it is quite clear that the plaintiff was

as he says, "in the dark," and the statement sent instead of a copy, did not fully enlighten him. Unless we believe the witness, Harding, perjured, we are bound to believe that the defendant was informed of there being errors in it early in January. He took no pains to correct them, and seems never to have attended the court at all, to give attention to this business. It was in making up the tableau, and stating the amount that the plaintiff had to distribute among the creditors, that the errors were committed which caused the loss to him. Shortly after the judgment of homologation was rendered, the defendant knew it, but took no steps to ascertain precisely what had been done, or to have the errors he had made corrected.

About the 4th of April, 1838, the plaintiff wrote to the defendant, stating various errors in the tableau, and complaining of his conduct. The defendant some time after replied, justifying himself, denying that there was any error, and adding, if there was, that it was owing to the fault of the plaintiff in not giving correct information, and from not examining the account or tableau, when shown to him. The parties, about the 19th day of April, met at Baton Rouge, when an amended tableau was drawn up, and presented to the Judge, in which the errors of the former were exposed, and a petition was presented to the Probate Judge asking for their correction. This application was rejected, and the decision affirmed by this court. 13 La. 156. The plaintiff shows, that he has paid the money thus erroneously stated to be in his hands, to the creditors of Browder's succession, and claims to recover it of the party through whose error or neglect he was compelled to do so. The correspondence between the parties. subsequently to the filing of the corrected tableau, is not important, as it consists principally of reproaches on the one side for not paying due attention to the business, and denials of the charge. with references to previous transactions, and explanations relating to them and the business generally.

The parol testimony shows, that the defendant is a lawyer proverbial for his attention to business; that he is a competent accountant, well versed in the mode of keeping books and often employed in consequence of his knowledge and skill in unravelling intricate transactions and accounts. It is also shown, that

he stands high as a professional man, a fact admitted by the counsel for the plaintiff in the argument. The accounts filed show, that the defendant has received a large sum for his services, and in one of his letters he mentions that he has in his possession a considerable amount of chirographic claims against the succession, which he will pay off, as soon as he shall receive from the plaintiff a sum exceeding seven thousand dollars. It is also proved, that when the parties met in the Judge's office at Baton Rouge, the plaintiff charged the defendant with having committed the errors and mistakes, and said that he ought to be liable for them; that defendant expressed his sorrow on account of them, saying that he was not aware of their existence until he was informed by the plaintiff, and that he would endeavor to remedy the matter by filing an application to have the tableau amended.

The case was tried by the court below, and a judgment rendered for the defendant, from which the plaintiff has appealed.

The evidence satisfies us, that the defendant was employed as the principal counsel to manage the affairs of the succession in the country, and that he did so. Much reliance was placed on him by the plaintiff, who is a merchant of New Orleans. was specially charged to prepare the final tableau of distribution of the funds to be paid out, and was furnished with the documents necessary, or knew where they could be obtained, for the purpose of making it correctly. He did make the tableau in which the errors occurred, without the interference or assistance of any other counsel. It was filed with the knowledge and consent of the plaintiff before he knew much about it, and, under the circumstances, we are compelled to believe the testimony of Harding, as to the plaintiff's having pointed out the errors to the defendant in January, 1838, which was before the homologation. Besides this, there is no evidence that the defendant ever went to Baton Rouge after he filed the tableau, to give the business any attention, until after it was homologated, a period of nearly three It does not appear that he went there at all, until he went in company with the plaintiff, late in April, 1838, although he knew that oppositions had been filed, and that the creditors were, to use his own language, clamorous as to the management of the estate.

Actions of this description are not of frequent occurrence, but whenever they have been instituted, either in this State or elsewhere, the same general rule has prevailed, that lawyers, like all other agents, are responsible for their negligence and want of skill in relation to the business entrusted to their care. of the Legislature of 1808, makes them responsible for costs and damages in some cases, for absenting themselves from the courts where they have business, without good cause, and for other neglects. B. & C.'s Dig. 21, 22, § 5. The Spanish law made attorneys responsible for fraud or fault. Partida, 3, 5, 26. case of Breedlove, &c. v. Turner, 9 Mart. 353, this court held, that an attorney and counsellor at law is liable to his client for the mismanagement of the suit, even though it be without fraud, but not for an error of judgment, unless the error be so gross as to show the want of competent and ordinary legal acquirements This principle prevails in the other States of the and attention. Union, in England, and in every country where the relation of counsel and client exists. In the 8th volume of the Massachusetts Reports, 57, the court said: "There is no doubt that for any misfeasance or unreasonable neglect of an attorney, whereby his client suffers a loss, an action may be supported and damages recovered to the amount of that loss." But this does not mean that every error or mistake is to make an attorney liable. acts in good faith, and with ordinary or reasonable skill and knowledge, he will be protected. The court in Massachusetts then proceeded to decide the cause, and on a state of facts not as strong as that presented in this case, held the attorney liable for the debt which was lost. In giving the opinion, the Judge who pronounced it said, he was acquainted with no man in whose faithful and upright conduct and diligent attention he had more confidence than in the defendant's, and that he had no doubt the error complained of had its foundation in a humane desire to save expense and vexation to the debtor.

The English books contain many cases in which the same principle has been held. In 4 Barnwell & Alderson, 202, (6 Eng. Com. Law Rep. 401,) an attorney was held liable, who suffered the case to be called, without previously ascertaining whether a material witness was in court, or could be had Vol. VII.

during the trial, whereby the plaintiff was nonsuited. In 1 Bingham, 347, (8 Eng. Com. Law Rep. 341,) an attorney who neglected to appear before an arbitrator, whereby his client lost his cause, was held responsible. In another case, an attorney was employed to examine and prepare the titles to an estate, to be laid before counsel for an opinion. He omitted to recite or present two deeds, whereby an opinion was given that would not have been, if those two deeds had been presented. The purchaser had to pay a sum of money in consequence, to make his title good, and it was held the attorney was liable for it. 10 Eng. Com. Law Rep. 232. 18 Ibid. 348. In 7 Bingham, 413, (20 Eng. Com. Law Rep. 183.) an attorney who was employed to defend an action, neglected to file his plea, whereby a judgment by default was obtained. It was decided, that the attorney was responsible for the damages, without the plaintiff's having shown that he had a good defence. In 10 Bingham, 491, (25 Eng. Com. Law Rep. 217, 219,) an attorney allowed his client to execute a covenant which was unusual, without explaining its purport and necessity, in consequence of which he sustained damage, and it was decided that he was responsible. The principle established by the Court of Common Pleas is, that an attorney is bound to take care that his client do not enter into any stipulation or contract, that may expose him to a greater degree of responsibility than is ordinarily attached to the business in hand, without explaining the consequences of it. The cases cited show how far courts have gone in enforcing the principle of the responsibility of an attorney towards his client. If we consider him in the light of an agent, the law is equally positive and precise. If the duty or obligation be violated, either by exceeding his authority, by positive misconduct, or by negligence or omissions in his proper functions, and damage ensue, the loss or damage will fall on the agent, and he must make a full indemnity.

The defendant rests his defence on four grounds; and has, in this court, filed a plea of prescription of one year.

The first ground is, that Linton, the first administrator of the estate was furnished by him, (the defendant,) with the form of a legal tableau of distribution, to be filled up, but that he disregarded it, and got other counsel to prepare a statement of the re-

ceipts and expenditures, about which he was not consulted. This form it is said came into the possession of the plaintiff, who, on filing his first account or tableau in 1836, also disregarded it, and consulted other counsel, whereby great confusion was created, and it became very difficult to ascertain the true condition of the estate: whereas if his form and advice had been followed, there could not have been any mistake or difficulty. The defendant and his counsel then go into an examination of the facts and accounts, to sustain this position. Admitting all that is said to be true, we do not well see what justification it is of the defendant. It is not attempted to make him responsible for the first or second account, nor is it shown that there is any error in them prejudicial to the plaintiff. Obscure and confused thev perhaps are, and had the defendant's advice and form been followed, it is possible they would have been less so; but of that we can form no opinion, as the original form of the account or tableau is not before us, and the evidence does not tell us what the advice was. It was perhaps in consequence of the obscurity and vagueness of the accounts, that the defendant was selected to make the final distribution and statement. He was reputed to be among the best accountants in the country; had long been cognizant of the affairs of the succession; was proverbial for his attention to business; and, therefore, supposed to be above all others best qualified to untangle the difficulties which embarrassed the estate and accounts. The errors complained of in this account are found in its first items. It represents the balance on hand, from the previous accounts, as much larger than it really was; consequently the plaintiff had to pay it. Had the defendant had those accounts before him, as he should have had, it is not probable that, with ordinary skill and investigation, he would have made the mistake. The defendant knew that these documents were in existence, where they were, and must also have been aware of their importance in making out a correct statement. He should, if he did not have them, have told the plaintiff that they were necessary; and he should not have filed a tableau without seeing them. It was the omission of the defendant that caused the error, because if he had referred to what had previously

taken place, it is not probable that, with ordinary care and vigi-, lance, any mistake would have been made.

The second ground is, that there was no negligence on the part of the defendant as the attorney and counsellor of the plaintiff, and that he did not disobey any instructions given him, but that, on the contrary all the neglect was on the part of the plaintiff, in not furnishing full and ample statements of the proceeds of the succession, and the amount of claims paid previously, or that were still owing. To the inattention, and want of time on the part of the plaintiff to examine the tableau before it was filed. and to his neglect in failing to examine the copy sent him in Decemler, 1837, the whole difficulty is attributed. To show that the ground is tenable, the defendant, in his oral and written arguments, has gone at great length into the evidence and correspondence, but we think without success. He was at the time, the only counsel of the plaintiff in relation to this business; he had been a principal manager of the estate; and if the plaintiff had not furnished the necessary documents and information, he should not have proceeded until they were procured. correct for the defendant to proceed on insufficient or incorrect data, and thereby commit the plaintiff without letting him know it. But the evidence shows, that the defendant had all the documents for the purpose of making a tableau, and that he strongly advised its being made and filed immediately. In his letter of the 22d of November, he says, that it was already made out, and the counsel of one of the creditors informed of it some time before, although we do not see the plaintiff mentioning it, until his letter of the 18th of November, 1837. He says further, that he will bring it with him, to show to the plaintiff, in a few days. That he did bring it and show it is more than probable; but it is evident the plaintiff knew very little about it, as, in a short time after, he complains that a promised copy has not been sent. and says that he is "in the dark" about it. The substance of the document was sent in the letter of the 23d of December, 1837, and an intimation was given that the defendant would soon be in the city, and communicate further. Harding says, that he was in the city about the 9th of January, 1838, and that the plaintiff then pointed out the errors. The attempt to show that this wit-

ness was mistaken, has no support from anything we can find in the record.

The third ground assumed is, that it was necessary and incumbent on the plaintiff to file a final tableau at the time it was done, because he had the proceeds of the property in his hands, and the creditors were anxious to get their money. Various portions of the evidence are referred to with the view of proving this necessity. We are entirely convinced that it was time a final distribution of the funds should be made. The succession had been opened more than five years, and was still not settled. But admitting the necessity of such a tableau, it does not, in our opinion, authorize or justify the defendant in preparing and filing an erroneous one.

The fourth ground of defence is, that if an interest account were opened between the plaintiff and the succession, it would appear, that he ought to have accounted for about \$17,500 more than he did, for interest on the sums in his (plaintiff's) hands for seven years, which sum it is contended fully indemnifies the plaintiff against the alleged losses. We have not gone into a calculation of the interest said to have accrued, as we cannot see what possible right the defendant has to be benefitted by a demand, which, if it exists at all, is owing to the creditors or heirs of Browder.

The last ground of desence is the plea of prescription of one year, as the desendant is charged with a quasi-offence, and more than one year has elapsed since the commission of the act which caused the damage. The erroneous tableau was filed on the 30th of November, 1837, and finally homologated on the 27th of February, 1838. The desendant insists, in one branch of his argument, on the fact, that neither he nor the plaintiff knew of any error until the 4th of April, 1838; and on the 19th of the same month proceedings were commenced to correct the error. That suit was not finally decided until the 25th of March, 1839, and this suit was commenced on the 23d of July following, about which time the money was paid by the plaintiff to the Sheriff, under an execution in favor of the heirs of Browder. Until this time the damage had not been actually paid; and until the 25th of March, 1839, the plaintiff did not know whether he would be

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made actually responsible. Considering the relations existing between the parties and the facts, we do not think the plea can be sustained.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed; and proceeding to give such judgment as in our opinion ought to have been given in the court below, it is ordered, adjudged and decreed, that the plaintiff, William E. Thompson, do recover of the defendant, John L. Lobdell, the sum of nine thousand three hundred and five dollars and fifty-nine cents, with costs in both courts.

PHILIPPE GUESNON v. HIS CREDITORS.

Mortgages acquired by third persons under the faith and protection of a decree of a court of competent jurisdiction, which has never been annulled, ordering the erasure of a previous mortgage, must be respected. Third persons are not bound to look beyond such a decree.

APPEAL from the District Court of the First District, Buchanan, J.

D. Seghers, for the appellant.

Preston, contra. The judgment of a Probate Court ordering the erasure of a mortgage cannot be treated as a nullity. 6 La. 366. It can only be annulled by a direct action. Code of Pract. arts. 605, 606, 610, 612.

T. Slidell, Hoa, Denis and L. Peirce, on the same side.

Simon, J. The dative testamentary executor of Antoine Carraby, deceased, is appellant from a judgment disallowing and rejecting the judicial mortgage by him claimed on the property of the insolvent, and homologating the amended tableau of distribution, filed by the syndic of said insolvent's estate on the 22d of October, 1842, except as it regards that mortgage. This judgment was rendered on the appellees' oppositions to the tableau.

The record discloses the following facts: After various proceedings had before the Court of Probates of the parish of Orleans, in the settlement of the estate of Antoine Carraby, deceased, on the account filed by P. Guesnon, acting as testamentary execu-

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tor under the will of the deceased, which account included a certain item of \$9349 34, as having been received by said Guesnon on his legacy, a final judgment was rendered by that court, on the 1st of May, 1839, amending the executor's account, ordering that the executor recover of different persons therein named the several sums therein specified, and further decreeing, "that the items in favor of Philippe Guesnon for the amount received by him on his legacy, be stricken off from the testamentary executor's account." This judgment was subsequently brought up by appeal before this court, in relation to the interest of Etienne Carraby, and corrected only in this last particular. 3 Robinson, 349. It appears further, that the judgment of the Probate Court was duly recorded in the office of the Recorder of Mortgages, on the 11th of May, 1839, so as to acquire the effect of a judicial mortgage on Guesnon's property, for the sum of \$9349 34; but that the inscription was cancelled and erased, as to Guesnon, by order of the Court of Probates of the parish of Orleans, dated the 24th of July, 1839, and deposited in the Recorder's office on the 31st of the same month.

It is further shown, that some time after the judgment had been recorded, a rule was taken by Philippe Guesnon on the Recorder of Mortgages, and on all the parties concerned in said judgment, to show cause, on the 19th of June, 1839, why the mortgage resulting against said Guesnon from the registry of the judgment should not be erased and cancelled, as not authorized by the same; whereupon, after due proceedings had under the rule, a judgment was rendered by the Court of Probates, ordering the Recorder of Mortgages to erase and cancel from his records the mortgage resulting from the judgment thereon inscribed as against Philippe Guesnon. This was done accordingly, as shown by the Recorder's certificate already noticed.

It further appears that, on the 15th of December, 1838, H. R. Denis, (one of the appellees,) having sold to Guesnon, a certain lot and the improvements thereon erected, the price thereof was settled by promissory notes, for securing the payment of which a mortgage was reserved on the property sold. On the 14th of December, 1840, a loan of \$6000 having been obtained by Guesnon from an insurance company, as also another loan of \$3500

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from Denis, Guesnon secured them both by a mortgage on the property originally purchased from Denis, the latter giving the priority of the mortgage to the company. On the 30th of January, 1841, the original mortgage reserved by Denis on the property by him sold, was erased from the books of the Recorder.

It is also shown, that the Bank of Louisiana has a mortgage on certain property of the insolvent, to secure a sum of \$11,700, which mortgage was executed on the 15th of December, 1840, and recorded on the 17th of the same month.

We find further in the record that, on the 4th of June, 1842, the appellant Dumas, acting as dative testamentary executor of Antoine Carraby, deceased, instituted a suit against Philippe Guesnon, as syndic of his own insolvent estate, in the Court of Probates, praying that the judgment rendered on the 24th of July, 1839, directing the cancelling of the judicial mortgage resulting from the recording of the judgment theretofore rendered in the settlement of the estate of Antoine Carraby, be avoided and annulled, and that the said judicial mortgage be reinstated. This demand was resisted by Guesnon on the plea of res judicata; whereupon the Probate Court rendered judgment sustaining the exception rei judicata, and dismissing the executor's petition. From this judgment, it is not shown that any appeal was ever taken.

It appears also, that the Judge, a quo, having rendered a judgment in favor of the present appellant, giving effect to the judicial mortgage by him claimed in his opposition to the tableau first filed by the syndic, and declaring that the judgment of the Court of Probates cancelling the inscription of said mortgage was a mere nullity, and consequently giving a preference to the judicial mortgage over those claimed by Denis and other mortgage creditors, an amended tableau of distribution was filed by the syndic according to the terms of said judgment; but a new trial having been granted by the court, a qua, the appellees filed their oppositions to the amended tableau, opposing specially the judicial mortgage claimed by the appellant as recognized in the tableau; and it is on those oppositions that the judgment appealed from was rendered, rejecting and disallowing the judicial mortgage claimed by the dative testamentary executor, as having

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been erased by virtue of a judgment, the nullity of which has never been declared in the manner provided for by law.

The appellant contends, that the decree recorded on the 11th of May, 1839, must operate as a judicial mortgage on the property of the insolvent; that it was not raised as to the estate by him represented, by the judgment of the 24th of July, 1839, ordering it to be cancelled, and is still in force in favor of said estate, and binds the insolvent's property.

Several questions have been raised by the appellees in opposition to the appellant's pretensions, one of which has been strenuously urged, to wit, that the decree of the Court of Probates recorded on the 11th of May, 1839, cannot operate as a judicial mortgage in favor of the estate of Antoine Carraby against Philippe Guesnon, because there is no formal decree, and there could not be any judgment in favor of Philippe Guesnon, executor of Carraby, against Philippe Guesnon as executor, or individually. This position of the opponents would present a very important and serious question in relation to the effect of judgments rendered by Courts of Probate on the rendition of accounts of curators, administrators, or testamentary executors, whenever those judgments would present, after liquidation of the accounts. a balance in favor of the estates administered, against the curators or administrators; and we are not ready to say, that such judgments should not have the legal effect which is given to final judgments in general, and should not be subject to the legal consequences derived from their dispositions. Here, however, Guesnon is not condemned to pay any sum of money; the decree only orders that an item contained in his account in his favor, be stricken off from his said account; it is doubtful, therefore, if an execution could ever issue against him for any specific amount, by virtue of said judgment; and if it could, in whose name and for whose benefit such execution should issue. But, be this as it may, we think that, under the facts above stated, it is unnecessary for us to test the correctness of the judgment appealed from. by any other question but that resulting from the effect which is to be given to the judgment rendered by the Court of Probates on the 24th July, 1839, by virtue of which, the inscription of the previous judgment was subsequently erased and cancelled. Can Vor., VII. 49

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we treat that decree as a nullity, or inquire into its correctness and validity?

It is shown that the appellees acquired their mortgages subsequent to the cancelling of the inscription. At that time, they were undoubtedly informed that the property was free from mortgage; nay, the certificate of mortgages procured from the Recorder's office and recited in the acts, shows that the only mortgage then existing on the property mortgaged to the Merchants Insurance Company and to Denis, was the one reserved by Denis to secure the price of the property by him sold, and we may fairly presume, that the latter was subsequently raised on the faith and credit to be attached to the declaration of the Recorder of Mortgages in his certificates. Indeed, we cannot suppose that Denis would have consented to release his former mortgage, if he had been made aware of the existence of a judicial mortgage, which was to take precedence over the second mortgage by him taken, or if he had not been informed of the judgment by virtue of which said judicial mortgage had been erased; nor can we believe, that the Bank of Louisiana would have accepted the mortgage executed in its favor by Guesnon to secure the loan of a large sum of money, if, from an inspection of the books of the Recorder of Mortgages, it had not been ascertained that the inscription previously taken by the estate of Carraby, had been subsequently cancelled by judicial authority.

Now, ever since the decision of this court in the case of Casanova's Heirs v. Avegno, 9 La. 195, we have uniformly held, that where there is a formal decree of the Court of Probates, recognizing the necessity of the sale of property for the payment of debts, the purchaser is not bound to look beyond said decree, which has the force and effect of a judgment, and which cannot be invalidated or annulled but by a direct action of nullity. 11 La. 149. 13 Ibid. 434. 14 Ibid. 146. So in the case of Lessassier v. Dashiel, 14 La. 468, we held, that whatever be the result of a suit by which a minor, on arriving at the age of majority, seeks to annul a judgment, by virtue of which his general mortgage was released, it cannot affect the rights of a party who purchased under the faith of proceedings apparently sanctioned by the Probate Court. So, also, in the case of Le Blanc v. His

Creditors, 16 La. 124, which is a case greatly analogous to the present one, we held, in substance, that judicial mortgages, and a fortiori conventional ones, acquired by third persons, under the faith and protection of a decree of a court of competent jurisdiction, which had never been annulled, should be satisfied in preference to a minor's pretended general mortgage, which had been released previous to the recording of the judgment. This doctrine was again recognized in the case of Lessassier v. Dashiel, 17 La. 198, and in the case of Rhodes v. The Union Bank of Louisiana, ante p. 63. Here, again, the mortgages of the appellees were acquired under the faith and protection of the decree of the Court of Probates, rendered on the 24th of July, 1839; and it is clear, that their rights so acquired under and supported by the previous sanction of judicial authority, cannot be defeated, and must be respected.

Judgment affirmed.

Succession of Hardin L. Tilghman.—Thomas O. Tilghman, Curator, Appellant.

An action on a judgment obtained in another State is prescribed only by the lapse of twenty years, where the judgment creditor resides out of this State. C. C. 3508.

The statute of the State of Alabama of the 10th of January, 1835, which provides (s. 3) "that when any execution shall have been issued on any judgment or decree, &c., within a year and a day from the rendition of any such judgment or decree, which shall not have been returned satisfied in full, such judgment or decree shall not afterwards be presumed to be paid or satisfied, without payment or satisfaction be entered on the records of the court, &c., unless no execution shall be issued on such judgment or decree for the space of ten years," establishes a legal presumption of payment in favor of the debtor, when the creditor, after suing out, within a year and a day from the date of the judgment, an execution which is not returned satisfied in full, remains for ten years without taking out another execution. It does not absolutely bar the right of action on such judgment, but throws on the creditor who seeks to recover on it, the burden of proving that it has not been satisfied.

The effect of a legal presumption is, to relieve the party in whose favor it exists from the necessity of making any proof; but this presumption may be destroyed

by proof that the fact is otherwise than the law presumes. Aliter, as to presumptions juris et de jure, against which no proof can be admitted.

A judgment rendered in another State, properly authenticated, must have the same force and effect here as in the State in which it was rendered; but it can have no greater effect. Thus, where by the laws of the State in which a judgment was rendered, it will be presumed to have been paid in case no execution be issued thereon within a certain time, such presumption will attach to the judgment, and exist in favor of the debtor in an action on the judgment in this State.

Where a statute declares that a judgment shall be presumed to have been paid, in case no execution be sued out within a certain period after it was rendered, the period must be calculated from the date of the judgment, though anterior to the passage of the act, and though sufficient time have not elapsed since its enactment to establish the presumption if calculated from that time.

APPEAL from the Court of Probates of New Orleans, Bermudez, J. This was an action by Boggs, Cochran & Co. against the administrator of the succession of Hardin L. Tilghman, on a judgment which the petitioners had recovered against the deceased in the State of Alabama, on the 4th of October, 1824. The curator of Tilghman's succession pleaded a general denial, averring that if any such judgment as that alleged ever existed, it had been satisfied. He also pleaded prescription. The record shows that a fi. fa. was issued on the judgment in Alabama, on which a return of nulla bona was made on the 30th of March following. It was admitted that no ca. sa. had been issued on the judgment, nor any proceedings had against the bail. It was further admitted that Tilghman had resided in New Orleans since 1827, and that, since 1832, he had been reputed to be wealthy, being the owner of lands, &c.; and that he died, in 1839, leaving property more than sufficient to pay all his debts. The printed statutes of Alabama were admitted in evidence. There was a judgment below in favor of the petitioners, from which the curator of the succession has appealed.

Anderson and Elwyn, for the petitioners. The statute of Alabama, of 1835,* if construed to be a limitation of time after which

^{*} This act was passed on the 10th of January, 1835. It is in these words:

An act to authorize the issuing of executions in certain cases, and for other purposes.

Sect. 1. Upon the rendition of any judgment in any court of record in this State, it shall be lawful for the judge of said court, in term time, to order the clerk there-

the judgment could not be enforced, is not obligatory on the courts of this State. Prescription is a plea to the remedy, not affecting the rights of the parties to the contract or judgment. Elmore v. Cohen, 13 Peters, 327. The action on the judgment is not prescribed by the laws of this State. But the statute of Alabama does not bar a right of action on the judgment even in that State; it only fixes the period within which a scire facias is a pre-requisite to suing out an execution. This will be evident from considering how the common law stood before the statute.

of to issue execution immediately upon the affidavit of the plaintiff, or his, or her agent or attorney, that the defendant is about to remove his or her effects, beyond the jurisdiction of the court, or that the plaintiff will be in danger of loosing his or her demand by further delay.

Sect. 2. The issuance of execution in such case, shall not deprive the defendant or defendants of the right of appeal, writ of error, new trial, motion in arrest of judgment, or any other remedy to which by law, he or they would otherwise be entitled.

Sect. 3. When any execution shall have been issued on any judgment or decree of the Supreme Court, or any circuit court, or county court within this State. or upon any judgment of a justice of the peace, within a year and a day after the rendition of any such judgment, or the making of any such decree, which shall not have been returned satisfied in full, it shall be lawful, at any time thereafter. to issue execution on any such judgment or decree, without suing out any scire facias, or other process to revive the same. And when an execution shall have been issued, or sued out on any such judgment or decree, within a year and a day from the rendition of any such judgment, or the making of any such decree, which shall not have been returned satisfied in full, such judgment or decree shall not afterwards, be presumed to be paid or satisfied, without payment or satisfaction be entered on the record of the court in which such judgment or decree shall have been rendered or made; or in the case of a judgment of a justice of the peace. on the docket in which such judgment shall have been made, or on the execution issued on such judgment or decree, unless no execution shall be issued on any such judgment or decree for the space of ten years.

Sect. 4. And whereas doubts have arisen whether a scire facias would lie on a judgment where execution had not issued within the year and day; for remedy whereof, Be it further enacted, That on all judgments of record, where execution has not been issued within a year and a day, it shall be lawful for the plaintiff in any such judgment, to have a scire facias against the defendant, commanding him to appear at a regular term of the court in which such judgment is of record, and show cause, if any he or she have, why the plaintiff shall not have execution of his or her said judgment.

By the common law, in real actions, the recovery being a thing certain, the mode of executing a judgment was entered on the roll; and as the absence of such entry was evidence that the judgment was unsatisfied, the demandant, had he delayed his execution for a year and a day, might thereafter, at any time. have a scire facias on the defendant to show cause why he should not have his execution. Not so, however, in personal In such case, the identity of the recovery not being ascertained, no entry was made on the roll of the mode of executing the judgment, and the roll, therefore, did not denote whether the judgment was executed or not. Hence, if the defendant delayed a year and a day, he could not have a scire facias, and the benefit of his judgment was in some measure lost to him. But, even by common law, he was not, after such delay, entirely without remedy. He might bring an action of debt on his judgment, and thus repel the inference of delay, by giving the defendant an opportunity of showing in that action whether he had paid it, or whether it had been released. For remedy of this inconvenience the statute of Westminster 2d, 13 Edw. I. was passed, whereby it is enacted, that "all things whatsoever enrolled to which the King's Court may lawfully give effect, from henceforth shall have such force, that hereafter it shall not be necessary to implead upon them: but when the plaintiff comes to the King's Court, if the thing enrolled be recent, that is to say within the year, he shall forthwith have execution of the same. And if perchance it be made of a longer time past, the Sheriff shall be commanded that he make known to the party of whom the complaint is made, that he be before the justices at a certain day to show if he has any thing to say, why such matters enrolled ought not to have execution." This statute gave a scire facias on judgments in personal actions, and. as is observed by Tidd, (2 vol. p. 1002, of his Practice,) did not take from the plaintiff an action of debt on his judgment, if he thought proper to assert his right to it.

Thus stood the common law, modified by a statute of a date almost coeval with the origin of its customs; and thus it stood at the time the Legislature of Alabama enacted the statute in question.

That State, it will be remembered, had like some of the States,

by its constitution declared the common, law to be the foundation of its jurisprudence; but, unlike others, the constitution of that State in adopting the common law excludes the statutory enactment of Westminster 2d. Hence, as many of the ancient statutes were declaratory of the common law, and not creative of a new rule or one afore time unknown, it was long a question of doubt concerning certain principles, whether they were of common law or statutory growth. The statute before us exhibits a difficulty of this kind. "Whereas," says the statute, "doubts have been entertained whether a scire facias can issue, after the lapse of a year and a day, &c., no execution having issued within that time, for remedy be it enacted, &c." It proceeds to give the rule as laid down in the English statute, and also to enact, that where the judgment has lain dormant without execution for ten years, an execution cannot issue thereon without first issuing a scire facias.

But may not an action of debt be brought in Alabama, or elsewhere, on this judgment, notwithstanding this statute? The statute, like that in England, only intended to regulate the right to an execution, and directed that after the lapse of a certain period of time, the plaintiff should not have it, without a scire facias, in order that the defendant might have an opportunity of showing payment or a release. But it was not intended to take away the action of debt, in which the defendant might make such defence as well as if a scire facias had issued.

C. M. Jones, for the appellant. The burden of proving that the judgment had been satisfied was not on the debtor. It is presumed by law to have been paid. 1 Campbell, 217. 2 Washington, 323. Aikin's Digest of the Laws of Alabama, p. 621.

MORPHY, J. This suit was brought on the 27th of November, 1839, against the estate of the late Hardin L. Tilghman, on a judgment obtained by Boggs, Cochran & Co., against the deceased, and one John H. Cornish, in Lauderdale county, Alabama, on the 4th of October, 1824. The defence set up by the curator of the estate is prescription, and payment or satisfaction of the judgment sued on. The record shows, that a few days after the rendition of this judgment, an execution was sued out, on which a return of nulla bona was made, on the 30th of March, 1825, and that

since that time no execution has been issued on it, nor any other step taken to enforce its payment; that, in 1827, Hardin L. Tilghman came to this State where he settled; and that he died in this city, on the 7th of March, 1839, possessed of property to a considerable amount.

We are of opinion that the plea of prescription cannot be sustained. By reason of the absence of Boggs, Cochran & Co. from this State, sufficient time has not elapsed since the return of the execution in Alabama, to bar the action on the judgment. Code, art. 3508. As to that of payment, the curator has invoked a statute of Alabama given in evidence below. The third section of that statute provides: "That when any execution shall have been issued on any judgment or decree of the Supreme Court, &c., within a year and day after the rendition of any such judgment, or the making of any such decree, which shall not have been returned satisfied in full, it shall and may be lawful, at any time thereafter, to issue execution on any such judgment or decree. without suing out any scire facias or other process to revive the same: and when an execution shall have been issued or sued out on any such judgment or decree, within a year and a day from the rendition of any such judgment, or the making of any such decree, which shall not have been returned satisfied in full, such judgment or decree shall not afterwards be presumed to be paid or satisfied, without payment or satisfaction be entered on the record of the court in which such judgment or decree shall have been rendered or made, &c., unless no execution shall be issued on such judgment or decree for the space of ten years, any law, usage, or custom to the contrary notwithstanding." Aikin's Alabama Digest, p. 621, & 3.

We do not consider this law as absolutely barring the right of action on the judgment, either in Alabama or in Louisiana; but it clearly establishes a legal presumption of payment or satisfaction in favor of the debtor, when the creditor, after suing out within a year and a day from the rendition of the judgment, an execution which is not returned satisfied in full, remains for the space of ten years, without suing out an execution on such judgment. The burden of proving that the judgment has not been satisfied is, after the space of ten years, thrown on the creditor,

who seeks to recover on it by an action of debt. This section is materially different from the following one in the same law, which provides that when an execution has not been issued within a year and a day, the plaintiff can have a scire facias against the defendant to show cause why he should not have execution of his judgment. Ib. 4th sec. p. 622. In the latter case, the burden of proof is clearly on the debtor, who must show payment, release, or some other mode of satisfaction; while in the former, the law raises such a presumption of payment from the fact of the judgment having been suffered to remain dormant for the space of ten years, that the debtor, when sued, may rest his defence on such presumption, until it be rebutted by proof to the contrary. If the intention had been that, in both cases, the plaintiff should be allowed a scire facias calling on the defendant to show cause why execution should not be issued, the fourth section of the law would have so declared; but it seems to have been passed to remove doubts which existed as to the creditor's right to a scire facias, even in the case where no execution had issued within the year and day after the rendition of the judgment. See preamble to the 4th section. The effect of a legal presumption is, to relieve the party in whose favor it exists from the necessity of making any proof; but this presumption may be destroyed by proof that the fact is otherwise than the law presumes it to be. It is different with regard to presumptions juris et de jure: they establish so completely the fact presumed, that no proof to the contrary can be admitted. If the judgment sued on is saddled in Alabama with a legal presumption of payment, this presumption attaches to and accompanies it here, when it is made the basis of a suit. The constitution of the United States, art. 4, sec. 1, declares, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." From this clause of the constitution, and the act of Congress passed in pursuance of it, we understand that judgments from other States, properly authenticated, must have in this State the same effect which they would have in the States in which they were rendered; but surely they can have no other or greater force or effect. We have looked in vain into the record for any acknowledgment by the obligor, or VOL. VII.

any other proof tending to destroy the presumption of payment created by the laws of Alabama. Until this presumption is rebutted, the judgment sued on must be held to have been paid or satisfied, in the same manner as if payment or satisfaction had been entered on the record of the court which rendered it.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed, and that ours be for the appellant, as in a case of nonsuit; the appellees to pay the costs in both courts.*

Anderson, for a re-hearing. The statute of Alabama is entitled, "An act to authorize the issuance of executions, and for other purposes." It was passed in the year 1835, nearly ten years after the rendition of the judgment sued on. The third and fourth sections should be taken together. They prescribe the following rules: 1st. A plaintiff may have execution within the year, of his own mere motion. 2d. He may, if an execution be returned unsatisfied, have an alias execution at any time within ten years, of his own mere motion; but if more than ten years shall elapse, then he may have it by issuing a scire facias. 3d. If he do not sue out execution within the year, he may, nevertheless, have execution at any time by scire facias. It applies exclusively to the right of execution, requiring the preliminary proceeding by scire facias where no execution had been issued within the year, and where an execution had been issued and no alias had followed for the space of ten years.

By the common law, or rather by the statute of Edward I. if no execution issued within the year, there was a presumption of payment; but this presumption extended no farther, than to require the plaintiff to give the defendant an opportunity of showing that he had paid; and therefore, he was required to issue a scire facias, or commence an action of debt on his judgment, which he might do. 2 Tidd's Pr. 1002.

When the scire facias issued or an issue was made in the action of debt, the plaintiff was required only to show the existence of his judgment. He was not called on to repel the presumption of payment. That presumption had done its office, when it secured to the defendant the right of showing that he had paid the debt contrary to what the record avouched. This is obvious from the nature of a scire facias, which is a writ commanding the Sheriff to make known to the defendant, that there exists against him a debt of record, and that he show cause, if he can, why an execution should not issue thereon. So, if an action of debt were commenced, the plaintiff was bound to show his judgment, and nothing more. After the year, no execution having issued, there was a presumption of payment; but the force and effect of it was confined to the right of execution. Suppose an action of debt, after the year, no execution having issued, can it be believed that anything more than the record evidence of the debt, would be necessary to his right to recovery? And yet the presumption of payment attaches immediately after the year when no execution has issued, as it does immediately after ten years

when an execution has once issued and no further proceedings have been taken for that space of time.

Had this case then been tried in the State of Alabama, the record in the suit would have entitled the plaintiff to recover without any further evidence, although the presumption of payment would have taken from him the right to have an execution, of his own mere motion.

This is the construction given to this statute in Alabama. But whatever construction may be given to it, a court of this State, afferding a remedy according to the law of this State, can give no weight to a statute of Alabama prescribing a rule of procedure and nothing else. The opinion pronounced in this case, evertules all those decisions which affirm that the law of the forum governs the remedy, and that the course of procedure must be according to that law.

But suppose the statute to create a presumption of payment applicable to the debt for all purposes, what, in principle, does it do more than a statute of limitations? The former, it is said, prescribes an arbitrary relation between time and payment, which may be rebutted; the latter prescribes the same relationship, which may not be rebutted. They are identical in principle, and differ only in effect, the one being a presumption de facte, the other de jure. If our courts will not govern their remedies by a foreign statute of limitations, is there any reason why they should govern them by a foreign statute, founded on a principle entirely similar?

Considering the Alabama statute as creating a presumption, it must be considered as directory to the courts of that State, to take for true, that which, without the statute, could not be considered as judicially established. Is such a law one that we can recognize? Is it a law that can operate extra-territorially? The question cannot admit of doubt. The law of the forum governs. Suppose a question of survivorship to arise in our courts, between litigants residing in another State. Suppose that by the law of their demicil, a person of forty was presumed to survive a person of sixteen, when both had been lost at sea; and that by our law the presumption was directly the reverse. Can there be any doubt, that in such a case ear courts would be governed by the presumptions created by our law, and not by the law of the domicil of the litigants? The common law requires only one witness to establish a fact—the civil law requires more. Our courts would not adopt a different mode or degree of proof according as the contract arose here, or in a common law State. By our law a child cannot testify for a parent. Would our courts receive such evidence, if it were shown that the contract originated in a common law State, where the child would certainly be a competent witness? "There are many instances," says Sir William Grant, "in which principles of law have been adopted from the Civilians by our English courts of justice, but none that I know of, in which they have adopted presumptions of fact, from the rules of the civil law." Judge Story says, (Conflict of Laws, 526,) "it is a general truth. that the admission of evidence, and rules of evidence, are matters of procedure. and are therefore, to be governed by the laws of the country where the court sits." Lord Brougham in the case of Don v. Lepmann, says: "Whether payment is to be presumed, or not, depends on the law of the country in which the law is set in motion to enforce the agreement; and so must all questions of the admissibility of evidence; and that clearly brings us home to the statute of limitations."

The statute in question was passed in 1835, and the judgment sued on was ob-

tained in 1824. This suit was commenced about four years after the statute was passed in Alabama. Now if the statute be considered as affecting the judgment, it would be giving it a retroactive force, for the judgment was prior to the law about ten years. Considered as a rule of evidence binding on the courts of Alabama, it would not have defeated the plaintiff's action in that State. The presumption of payment arises from a silence of ten years. This must mean ten years after the act passed. Now this suit was commenced within four years after the enactment of that law. But there remains a question of much greater importance to be discused. The court say, that this statute was permitted to operate on the case, because the constitution and laws of the United States required them so to decide; that this constitution and these laws are paramount, and our courts are not at liberty to disregard their requirements. The several States of this Union are, sub modo, sovereign and independent. When the general government acts, it acts as sovereign; and and whatever it acts upon, whether states or individuals, it must needs act upon them as subjects. But the states where they act, do also act in a sovereign capacity, and as to all powers retained are as before the constitution. That instrument did not change the nature of their power, but took certain interests out of the scope of its operation. The Legislature therefore, of one State is as independent of the Legislature of every other, as each is of the Legislature of France or England. There is no clause in the constitution that gives any force and effect to the laws of one State within the territory of another-the doctrine asserted for the first time in the opinion delivered by the court in this case. A moment's reflection will show what important results flow from it. If Congress may prescribe the force and effect that the laws of one State may have in every other, then our legislation in all cases may become subservient to the legislation of some other State with the concurrence of the Congress of the United States. The court, no doubt, had in view the first section of the fourth article of the constitution, and the act of Congress of 26 May, 1790, made in pursuance thereof. That section declares, "that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may by general law prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The act of 1790 after prescribing the mode of authentication, declares the force and effect of judgments and judicial proceedings, but does not declare the effect of legislative acts. If, therefore, the clause in the constitution giving the power to declare the force and effect applies to legislative acts, it is quite certain that Congress has not exercised the right, for the act of 1790, and the supplemental act of 1826, do not pretend to declare that the legislative acts of one State shall have any force, as laws, in any other State.

But that clause in the constitution was never intended to confer such a power. It appears by the journals of the convention, that the amended report of this article read thus: "And the effect, which judgments obtained in one State shall have in another;" that this clause was stricken out, and the words "the effect there. of," were inserted. The clause as thus amended, passed without a division. It would seem, therefore, that the words were supposed to have an identical meaning.

Re-hearing refused.

Parmly v. Chinn.

LEVY S. PARMLY v. RICHARD H. CHINN.

APPEAL from the District Court of the First District, Buchanan, J.

McHenry, for the appellant.

Chinn, pro se.

MORPHY, J. This action was brought to recover the sum of \$2000, alleged to have been received by the defendant, as plaintiff's attorney at law, from F. Buisson, late Sheriff of the parish of Orleans, in 1839. The defendant denied his indebtedness, and averred that, on the contrary, the plaintiff was indebted to him in the sum of twenty dollars, for professional services, which sum he pleaded in reconvention. There was a judgment below rejecting the plaintiff's demand, and allowing the sum claimed in reconvention. The plaintiff has appealed.

On the trial below, no evidence whatever was offered by the petitioner to show any indebtedness on the part of the defendant, while the latter exhibited a settlement, or statement of an account between himself and the plaintiff by whom it is signed. In this settlement Parmly is debited with various charges for professional services, and for money advanced on his orders, amounting to \$2000; and he is credited with the sum of \$2000 as received by the defendant from the Sheriff, on the 14th of January, 1839. Several witnesses testified to the fairness of the charges set forth in the account, which the plaintiff himself had moreover sanctioned. This evidence, and that adduced in support of the reconventional demand, fully sustain the judgment appealed from.

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JACQUES BERTHIER NORBERT FORTIER v. JOHN SLIDELL and others.

A purchaser at a judicial sale of property on which there exists a general mortgage, judicial or legal, against whom an action has been commenced, or who has good reason to fear that an action will be commenced against him by the mortgagee, may withhold the price until relieved from such apprehension, or until proper security be given against the danger of eviction. C. P. 710.

The statement by a sheriff in an act of sale, that the property is sold subject to a general mortgage made in compliance with the provision of the Code of Practice, art. 693, § 6, can impose no obligation on the purchaser to which he is not subjected by law. Per Curiam: A sheriff has no authority of his own to impose any burden on a purchaser beyond the provisions of the law. Purchasers at sales under execution, are not personally bound for anterior general mortgages existing on the property purchased by them. They are only liable to an hypothecary action. C. P. 679, 683, 693, 710.

Where a purchaser at a judicial sale refuses to pay the amount of a special mortgage, which formed a part of the price and had been left in his hands at the time of the sale, on the ground of the danger of eviction, and the proporty is resold at the suit of the special mortgagee, the first sale becomes null and void.

The Code of Practice does not provide for the erasure of mortgages subsequent, or inferior to that of the suing creditor, where any surplus remains after paying his anterior, special mortgage. Art. 707 directs, that if any surplus remain after paying the suing creditor, the purchaser shall apply it to the payment of any subsequent special mortgages existing on the property; but there is no provision for a case in which the subsequent mortgages are not special, but general. In such a case, the purchaser being bound for nothing beyond the price of the adjudication, has a right, on paying that price, to have the property cleared of all encumbrances subsequent to that of the suing creditor; and as he cannot safely take upon himself to decide to which of the subsequent general mortgages the balance in his hands is to be applied, the institution of an action against the mortgages to compel them to establish their respective rights to the surplus in his hands, and to show cause why, upon depositing such surplus subject to the order of the court, their respective mortgages should not be cancelled, is a safe and proper course for him to pursue.

The mortgage which the wife has on the property of her husband for her dotal rights, is not required to be recorded. C. C. 3298. It secures the amount of such property, with legal interest from the dissolution of the community.

Although the distinct interest of the wife, or of her representatives, attaches at the time of the dissolution of the marriage, subject to the right to renounce and be exonerated from the payment of the community debts, they can claim nothing from the community until such debts are paid. No action can be maintained by them for the half of the price of any specific property acquired during the marriage, where it is not shown, by a liquidation of the community, that there are any gains to be divided.

APPEAL from the District Court of the First District, Buchanan, J. D. Seghers, for the appellant, cited Febrero Add., part 2, vol. 3. Nos. 411 to 421, pp. 538 to 546, 5th ed.

L. Janin, for the minors Puech.

T. Slidell, for J. Slidell.

MORPHY, J. On the 10th of February, 1840, the petitioner became the purchaser, at a sheriff's sale, of one undivided sixth part of a sugar plantation and fifty-five slaves, belonging to James Puech, in the parish of Plaquemines, for the sum of \$3600, at a credit of twelve months. The property thus adjudicated to him was subject to two general mortgages resulting from a judgment in favor of John Slidell, and one in favor of the successions of Mr. and Mrs. Daquin. The Sheriff left in the hands of the purchaser \$3270, which was the amount of a special mortgage held by the Union Bank, and received the balance. Shortly after the sale, the purchaser was threatened with eviction by Slidell, under his judicial mortgage, and by the children and heirs of the late wife of James Puech, under their legal mortgage against their father and tutor. He informed the Union Bank that, under such circumstances, he did not intend to pay the portion of the price which had been lest in his hands, whereupon the Bank brought suit against Puech under their mortgage, to which his late wife. Althée Josephine Daquin, had been a party bound with him in solido, and recovered a judgment for \$2165, with interest at the rate of ten per cent per annum from the 1st of March, 1837. On this judgment the Bank sued out an execution; and under the clause de non alienando included in their mortgage. levied it on the undivided sixth of the plantation and slaves in the possession of the plaintiff. At the second exposure of this property for sale, on the 19th of July, 1841, it was struck off to the plaintiff for the sum of \$6000, payable at twelve months, with interest at ten per cent per annum from that day. After paying the Bank principal, interest and costs, there remained in the hands of the purchaser a balance of \$2142 65 due. with interest at ten per cent from the 19th of July, 1841, until The present suit was brought by the purchaser, in which he avers, that the balance remaining due on the price of his purchase is insufficient to discharge either of the two general mort-

gages existing on the property; that he is bound for nothing beyond the price of his adjudication; and that on his paying that price, he has the right of having the property cleared of all subsequent or inferior mortgages or liens. He prays that J. Slidell. James Puech, the natural tutor of his children, and Louis Pilié, their under-tutor, may be cited to come and establish their respective rights to the aforesaid balance of \$2142 65, and to show cause why, upon paying or depositing such balance subject to the order of the court, their respective mortgages should not be cancelled, so far as they affect the property bought by him. Slidell answered, denying the validity of the sale whereby the plaintiff is alleged to have become the purchaser of the property, and averring that by nothing done in the suit of the Union Bank against Puech, has his mortgage, resulting from the registry of his judgment, been in any way affected or impaired. He further avers that, by virtue of the Sheriff's deed to the plaintiff, of the 18th of February, 1840, and the agreements and undertakings of the latter, he has become and is personally responsible to him for the full amount of his judicial mortgage, to wit, \$4855 62, and he accordingly prays for a judgment in reconvention against the plaintiff; but, should the sale made at the suit of the Union Bank be held good and valid, and if the sum proposed to be deposited is to be distributed among the mortgage creditors subsequent to the Bank, he then prays that it may be awarded to him. as his rights are superior to those of his co-defendants, which rights he denies, and of which he requires strict proof. James Puech, as natural tutor of his children, and Louis Pilié, as their under-tutor, answered, that as the beneficiary heirs of their mother, Althée Josephine, who died in June, 1835, the said minors are entitled to claim of James Puech, their father, the sum of \$4000, brought by her in marriage in January, 1827, and onehalf of the community of gains and acquets which existed between their father and mother at the death of the latter, which half is supposed to be at least \$20,000, though its true amount cannot be positively known, as the said estate and community were never regularly settled; that among the property owned by James Puech, at the time of his wife's death, was the undivided sixth part of the plantation and slaves now owned by the plain-

tiff; that under an order of the Court of Probates of the parish of Orleans, the property was, in June, 1836, offered for sale and adjudicated to John D. Bein, but for the account of James Puech, for \$15,666 66, no part of which price was ever paid by Puech, and one-half of which belonged to his minor children, being the proceeds of community property; and that for this amount, as well as for that of \$4000, their mother's dowry, they had a legal mortgage on all their father's property. These defendants aver, that the property in question is subject to the general mortgages which existed on it before the last sale to the plaintiff, in the same manner as if such sale had not takan place. They object to the legality of the course pursued in the premises. and deny the plaintiff's right of thus forcing upon them an issue with their co-defendant, J. Slidell. They pray that this suit may be dismissed and their hypothecary action reserved to them; but should it be incumbent on them to justify and enforce the mortgage of the minor children of Mrs. Puech, then Louis Pilié. as their under-tutor, acting in their behalf on account of the opposition of their interests to those of their tutor, avers that he has demanded payment of the sums due to them as aforesaid, more than thirty days ago, from the said Puech, and that they are still unpaid. He prays, that the property described in the petition may be seized and sold to satisfy their claim, as their mortgage is anterior to that of J. Slidell. The Judge below dismissed this suit, being of opinion that the plaintiff wrongfully refused to pay the amount due to the Union Bank, which had been left in his hands on the 10th of February, 1840, and that by suffering the Union Bank to seize and sell the property under their mortgage, he had not bettered his situation in relation io the general mortgage held by the defendants. The plaintiff has appealed.

The balance of \$3270, which the Sheriff left in the hands of the plaintiff, was a part of the price for which the property had been struck off to him. When he discovered that he was in danger of being evicted by the defendants, who held general mortgages on it, he was authorized, under art. 710 of the Code of Practice, to withhold the payment of the price until proper security was tendered to him. The evidence shows, that both of the defendants threatened the purchaser with a suit, and that one of Vol. VII.

them, J. Slidell, actually instituted proceedings against him. He was not, therefore, acting in his own wrong when he retained the price, and left the Bank to their legal remedy. In the sale which the Sheriff executed to the plaintiff in February, 1840, that officer, in compliance with art. 693, § 6, of the Code of Practice, made mention of Slidell's mortgage; but stated further, that the property was sold subject to such mortgage. It is on this mention or declaration of the Sheriff, that J. Slidell has averred that the plaintiff had become personally bound to him for the amount of his judgment; but it is clear that, by this mention or declaration, that officer must be presumed to have meant nothing more than to execute his deed according to law. He had no authority of his own to impose any burden on the purchaser, beyond the provisions of the law under which he acted. By these provisions, purchasers at sales made under executions are not personally bound for anterior general mortgages existing on property they may purchase. They are only liable to an hypothecary action. If such action be actually brought, or if they have a just fear of its being brought, they have a right to retain the price of the adjudication, or any part of it not yet paid, until the disturbance ceases, or they are properly secured against eviction. mention, therefore, made by the Sheriff in his deed, that the property was sold subject to Slidell's mortgage, did not in fact, and could not in any way, increase the legal obligations of the plaintiff. Code of Pract. arts. 679, 683, 693, 710. When the property, then, was seized and sold, at the suit of the Union Bank, the plaintiff was evicted of the title he had acquired under the former Sheriff's sale of the 10th of February, 1840, and that sale became null and void, and was no longer binding on him.

We now come to the question presented by the second sale of the same property, made by the Sheriff of the parish of Plaquemines. What was the plaintiff to do with the balance of \$214265, remaining in his hands, of the price of the adjudication, after paying the debt of the Union Bank? The purchaser is bound for nothing beyond the price of his adjudication, says article 708 of the Code of Practice. Had that price been inadequate to discharge the claim of the Bank, or barely sufficient to pay it, there could have been no difficulty, for the article just quoted provides

that, in such a case, the Sheriff shall give the purchaser a release from the mortgages subsequent or inferior to that of the suing creditor; but the Code no where provides for the mode of raising such encumbrances, when there remains a surplus after paying the suing creditor who had a special mortgage preferable, or anterior to them. Art. 707 of the Code of Practice provides that if, after paying the suing creditor, there be a surplus, the purchaser shall apply it to the payment of the special mortgages existing on the property, subsequent to that of the suing creditor. In the present case, there exists no special mortgage subsequent to that of the Bank, but there are two general mortgages, both subsequent or inferior to it. To whom, then, was this surplus to be paid, in order to exonerate the purchaser, and to clear the property from its encumbrances? It can hardly be pretended that in such a case the money should be paid to the debtor, leaving the purchaser exposed to be evicted by the subsequent mortgage creditors of that very debtor, who would thus have been permitted to pocket the money arising from the sale of their pledge. It is not, on the other hand, the province of the purchaser, nor can he safely take upon himself to decide to which of the two general mortgages the balance in his hand is to be applied. The purchaser being bound for nothing beyond the price of his adjudication, has surely, on paying that price, the right of having the property cleared of all encumbrances subsequent to that of the suing creditor. The course pursued by the plaintiff to assert and enfore this right presents, in our opinion, a safe and proper rule of proceeding for a case like the present. It arises ex necessitate rei. and we cannot see any good reason why, in the absence of any law to the contrary, it should not be adopted and sanctioned by us.

Our attention has been called to the circumstance, that the Sheriff's sale to the plaintiff, of the 19th of July, 1841, which is for the plantation and fifty-five slaves, recites the names of only sixteen out of twenty-five slaves mortgaged to the Union Bank in March, 1833. It is clear that the thirty-nine other slaves included in the Sheriff's deed, and on which the Bank had no mortgage, have continued in the hands of the plaintiff, to be subject to the general mortgages of the defendants, as in relation to these

slaves, their mortgages were not subsequent to that of the suing creditor. Code of Pract. arts. 708-710.

The judgment of J. Slidell for \$4855 62, was recorded in the parish of Plaquemines, on the 30th of April, 1839, and is not disputed; but the rights of the minors Puech have been denied by their co-defendant, and they have been called upon to prove them strictly. The sum of \$4000, which they claim for the dowry of their mother, is fully proved to have been received by James Puech in 1827. Although the marriage contract of their mother was never recorded in the parish of Plaquemines, she had by law a legal mortgage on all the property of her husband, which took effect in 1827. Civ. Code, art. 3298. Her heirs have, therefore, a mortgage superior to that of J. Slidell, for \$4000, with legal interest from the 1st of June, 1835, the date of the dissolution of the community, and are entitled to receive the balance in the hands of the plaintiff. Civ. Code, art. 2353. 7 La. 292.

In relation to their claim on account of the community of gains and acquets which existed between their father and mother, it is not shown that the community had made any acquets or gains; this can properly appear only on the liquidation of the community, and it is admitted that none was ever made. held, that the wife or her representatives, although their distinct interest in the community attaches at the dissolution of the marriage, subject to their right to renounce and be exonerated from the payment of the community debts, have nothing to claim out of the acquets and gains, until such debts are paid. 17 La. 238. 1 Rob. 378. In the conjugal, as well as in every other partnership, the party claiming a share in it can recover only on what remains after all debts due to third persons have been settled. The record shows that, with a view to such a settlement and liquidation, a sale of certain property in the parish of Plaquemines was made, in 1836, at the instance of J. Puech; but whether the proceeds sufficed to pay the debts of the community, or what surplus was left, or whether there was other common property, does not appear, as the proceedings then begun in the Court of Probates were never carried further. We attach little or no importance to the declaration of a witness who testified that, in 1835, Puech had no debts. He does not inform us by what

means he acquired this positive knowledge of a negative. testimony cannot satisfy us that the community owed no debts whatever, and that we must allow to these minors one-half of the proceeds of the property sold in 1836, as their share of the acquéts and gains. In a suit against their father, they could have asked only for a settlement of the community, and for their share of such balance as might remain after the payment of its debts, ære alieno deducto. How then can it be pretended that, as against third persons, they can claim to be creditors of their father, for one-half of the price of any specific piece of property that may have been acquired during the marriage, when they do not show by a liquidation of the community, that there are any gains to be divided? This is more particularly the case when the representatives of the wife are beneficiary heirs, who, under our laws. are entitled only to the residue of the estate after the payment of all its debts. Civ. Code, art. 1051.

As the rights of the defendants have been established contradictorily with the plaintiff and with each other, we have been requested to allow them the right of seizing and selling in this suit the undivided sixth part of the thirty-nine slaves, yet subject to their general mortgage, without the necessity of resorting to other proceedings to enforce it. To this course the plaintiff does not object; but as he will be thereby evicted of his purchase of one-sixth of these thirty-nine slaves, he asks, and justice requires, that he should be allowed to retain out of the balance in his hands, the amount which the sixth part of the thirty-nine slaves brought in the price of \$6000, at which the sixth part of the plantation and all the slaves were adjudicated to him. This right we think he has under article 710 of the Code of Practice.

It is, therefore, ordered, that the judgment of the District Court be reversed; and it is further ordered that, on the plaintiff's paying to the minors Puech, the balance of \$2142.65, with ten per cent interest per annum, from the 19th July, 1841, (after deducting therefrom the amount which the sixth part of the thirty-nine slaves above mentioned brought in the \$6000, the price of the sixth part of the whole estate, and also the costs of this suit,) the general mortgages of the minors Puech, and of J. Slidell, be raised and cancelled, so far as the plantation and slaves described in

the mortgage to the Union Bank of the 30th of March, 1833, are thereby affected; the amount to be deducted as aforesaid, to be determined by experts to be appointed by the District Court, on the application of either of the parties. It is further ordered, that either of the defendants may take out an order of seizure and sale against the undivided sixth part of the thirty-nine slaves in question, provided the proceeds be apportioned among them, according to the amount and rank of their mortgages as above settled. And it is further ordered, that the costs of both courts be paid out of the balance in the hands of the plaintiff, as herein before mentioned.

7: 408, 46 297,

HORATIO N. HILLS and another v. CHARLES A. JACOBS and others.

Plaintiffs offered in evidence a paper proved by a witness to be a copy made by him at the request of one of the defendants from the original handed to him by the latter for that purpose, and which, with the original, had been returned to the defendant. Plaintiffs, having made oath that they had seen the original in possession of one of the defendants, notified the latter to produce the original. Two of the defendants answered that they had no such paper in their possession, nor had ever seen it, and that their co-defendant was absent, and moved for a continuance on the ground of surprise. Held, that the absence of the defendant to whom the original had been delivered was no ground for a continuance, and that the absence of the original was sufficiently accounted for to authorize the admission of the copy.

A principal is bound by the representations of his agent made in the transactions of the business of his employer.

No adjudication can be made of property subject to special mortgages of an older date than that of the mortgages at whose suit it is offered for sale, unless the price bid exceed the amount of the anterior mortgages. C. P. 684.

Where a bidder for property offered for sale at the suit of a mortgagee refuses to pay the price bid by him, on the ground that a mortgage held by him is entitled to a preference over that of the seizing creditor, and the sheriff in consequence refuses to complete the sale, the bidder cannot afterwards insist upon the sale as valid.

Where it is proved that plaintiffs were induced, through the misrepresentations of defendant, or his agents, to consent to accept in satisfaction of certain mortgage notes held by them an amount much below their real value, the agreement will be rescinded on the ground of error.

APPEAL from the Parish Court of New Orleans, Maurian, J. H. H. Strawbridge, for the plaintiffs, contended, that the agreement between plaintiffs and Jacobs was vitiated by error. Civ. Code, arts. 1815, 1818, 1821, 1826, 1840, 1875, 1890. Gasquet v. Johnson, 2 La. 167. Greenwell v. Roberts, 7 La. 65. Trudeau v. Mather, 7 La. 554. Parmele v. McLaughlin, 9 La. 436. Eastin v. Dugat, 10 La. 188. St. John v. Sanderson, 15 La. 346. Pothier, Oblig. Nos. 17, 29, 30, 42. 6 Toullier, Nos. 36, 37, 45, 59, 167, 168.

G. Strawbridge, on the same side.

W. M. Randolph, for the appellant. Plaintiffs sold their note to Jacobs, by a complete contract. Civ. Code, art. 2431. There was no error on the part of plaintiffs. If there was any, it is for them to show it. 6 Mart. N. S. 207. They must show, that they believed in the existence of something which did not exist, or in the non-existence of something which did exist; (Civ. Code, art. 1815;) that this belief was the cause which induced them to sell: (Ibid. art. 1819:) and that the purchaser, Jacobs, was aware that this belief was the principal cause of their contract. Ibid. art. 1820. Pierce v. Mahan et al., 15 La. 221. The error alleged is, that plaintiffs believed that the property mortgaged for the payment of their note had been sold to Lambeth under the execution of Bullard & Bludworth. The proceedings at the suit of Bullard & Bludworth were public, and any ignorance of their effect could only have resulted from plaintiffs' gross neglect, for which they alone are responsible. Civ. Code, art. 1841. Pothier, (Evans' translation,) pp. 182, 299. But the sale to Lambeth was valid. Code of Pract. arts. 690, 695. Civ. Code, arts. 2585, 7 Mart. N. S. 227. 17 La. 497. 19 La. 237.

L. Janin, on the same side.

GARLAND, J.* The petitioners allege, that the defendants are indebted to them in the sum of \$11,666 66, with interest thereon at the rate of eight per cent from the 21st of May, 1836, as the holders and endorsees of a note for the above sum and interest,

BULLARD, J. did not sit on the trial of this case, having an interest in the question.

drawn by Wm. Hunter, of the parish of Natchitoches, payable to Chas. A. Bullard on the 1st of May, 1842, which note was secured by a mortgage on the undivided half of a plantation and slaves in the aforesaid parish, upon which the defendants Lambeth & Thompson also had a mortgage, concurrent with or next in rank to theirs, in consequence of a waiver in their favor made by the said Chas. A. Bullard of his right of mortgage, to secure the payment of a similar note, due one year previous, also executed by Hunter. The petitioners aver, that Lambeth & Thompson, on or about the month of June, 1842, "by divers representations, by which they (petitioners) were led into error, obtained possession of their said note without consideration;" that Lambeth & Thompson, combining with their co-defendant to deprive them of their rights, transferred said note to him, with the intention that he should become the purchaser of the plantation and slaves so mortgaged, and use the amount of it in payment of the price; that said plantation and slaves were, in the month of November, 1842, sold at a sheriff's sale, and purchased by C. A. Jacobs for the price of \$60,982, about \$18,000 of which sum was paid by the amount of the note and interest so wrongfully and erroneously obtained, a part or the whole of which, was by said Jacobs passed to the credit of Lambeth & Thompson, who were indebted to him; wherefore they ask for a judgment for the aforesaid sum and interest, and for general relief.

The defendant Jacobs, after a general denial, avers, that the plaintiffs sold to him all their title and interest in the note mentioned and in the mortgage given to secure it, in full payment for which he executed his four notes, payable to them at nine and twelve months, amounting altogether to the sum of \$9461 25, which by agreement were to remain deposited in the hands of a third person, and be delivered whenever he should receive the titles to the aforesaid tract of land and slaves, on which the plaintiffs claimed to have a mortgage derived from Hunter. He alleges, that the money intended to be secured by his notes was the value at which the plaintiffs estimated their note and mortgage, and that it was a condition precedent that the notes should be deposited until the completion of the title. That the plaintiffs always looked upon the transaction as a sale of their interest in

the note and mortgage, and on his (respondent's) notes as the price; and that they endeavored to hasten the completion of his titles, so that they might obtain possession of them. He further avers, that since the institution of this suit, he has been advised that no obstacle exists to prevent a completion of his title to the property; and that, being unwilling to keep the plaintiffs out of the purchase money for their aforesaid interest, longer than was necessary to his security, he has caused a tender of his notes, so deposited, to be made to the plaintiffs, who have refused to receive them; and that they are still in the possession of the depositary, subject to the plaintiffs' order.

Lambeth & Thompson commence their answer by a qualified general denial, and then proceed to aver, that the plaintiffs, being willing to sell all the title and interest they had in the note of Hunter for the sum aforesaid, agreed with Lambeth to sell the same for two notes of their co-defendant Jacobs, to be dated on the 1st of June, 1842, one payable at nine months for \$4676 25, to the order of the plaintiffs, and the other at twelve months from said date for the sum of \$4085, also payable to them; and that they (plaintiffs) drew a receipt for the said respondents to sign, which they did, but that the plaintiffs never called upon them for it. They further state, that at the time they were negotiating for the purchase of the interest of the plaintiffs in the aforesaid note, they (plaintiffs) well knew that they were acting for their co-defendant (Jacobs,) and not for themselves, wherefore, they (plaintiffs) "chose rather to place themselves in direct privity with the real vendee, and accordingly entered into a new and distinct agreement, as to the purchase money and the time and manner of payment with him, with which these respondents had nothing to do."

The respondents aver, if they should be held responsible because of their agency in behalf of Jacobs in said transaction, that he (Jacobs) gave the price which the plaintiffs required for their interest in said note, and executed his four promissory notes for the sum to be paid, two payable at nine months and two others at twelve months, which were deposited in the hands of the person agreed upon, to be held and delivered when he (Jacobs) should receive titles for the tract of land and negroes of Hunter, which were mortgaged to secure the payment of said note held

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by the plaintiffs. The answer then concludes in very nearly the same terms as that of the other defendant.

The origin of the note in controversy is fully stated in the opinion of this court in the cases of Bludworth &c. v. Hunter, Lambeth & Thompson, Intervenors and of Bludworth v. Lambeth & Thompson, decided at the last October term, in the Western District.* It is there spoken of as a note in existence, but in the possession of an unknown person. The mortgage to secure the payment of it, and of the one held by Bludworth & Bullard, is fully stated; also the postponement or concession of Charles A. Bullard of his privilege and mortgage in favor of Lambeth & Thompson, over the note then held by Bludworth & Bullard. The fact is, the records in those cases, except in relation to what took place in this city immediately between the plaintiffs and defendants, enabled us to state more in detail the real origin, progress and conclusion up to December, 1842, of the numerous and complicated sales, mortgages, transfers and transactions between Hunter and Charles A. Bullard, and between them and Lambeth & Thompson, and between Bludworth & Bullard and Jacobs and the Commercial Bank, than the one now before us does, and we therefore refer to the statement in those cases, with the above exception, as being sufficient to give a full view of the grounds and points we feel called on to decide.

At the sale made by the Sheriff of the parish of Natchitoches, on the 4th of June, 1842, under the order of seizure and sale obtained by Bludworth & Bullard against Hunter, Lambeth & Thompson were the last and highest bidders. The Sheriff refused to make them a deed, because they refused to pay the sum which the Sheriff contended was coming to the plaintiffs in execution, and over whom they (L. & T.) contended they had a preference, in consequence of the postponement of privilege and mortgage made by Charles A. Bullard, the assignor of Bludworth & Bullard, in the act of mortgage given by Hunter to Lambeth & Thompson, he (the Sheriff) saying, he would not do so, un-



The opinion in these cases, which were tried together, was pronounced at the last October term, but the judgment did not become final until the present term.
 The opinion will be found in the 9th volume of these Reports, p. 256.

til ordered by the court. Lambeth took no step by judicial process to compel the Sheriff to complete the sale, or to make another, but returned to New Orleans shortly after, and from the admissions in the answer, we find him, as the agent of his co-defendant Jacobs, negotiating with the plaintiffs, who are residents of the city, and not shown to have been present at the sale, or as having any knowledge of it, to purchase the note held by them and due but a few weeks previously, representing that the undivided half of the land and slaves had only sold for \$18.400, out of which the City Bank of New Orleans was to receive one thousand dollars, and that the residue of the sum bid was to be divided between the plaintiffs and said Lambeth & Thompson, in consequence of their preference over Bludworth & Bullard; and a statement in the hand-writing of a clerk of Lambeth & Thompson, is exhibited by the plaintiffs, proved to have been copied by said clerk from a paper given to him for the purpose by Lambeth, showing how the fund was to be divided, and showing that the amount coming to the plaintiffs was less than \$9000. The first written document which presents itself, is a receipt dated June 22d, 1842, signed by Lambeth & Thompson, written by one of the plaintiffs, which states that they (L. & T.) have received the note of Hunter of them, (plaintiffs,) which is secured by mortgage, as stated, on the plantation and negroes on Red River; and then proceeds to say, "that in final settlement of this note we have this day given to Hills & Sinnott two notes drawn by Chas. A. Jacobs, as follows: one dated 1st June, 1842, for \$4676 25 payable at nine months after date, to their order: and one of the same date for \$4085, payable at twelve months after date, to their order." The receipt then binds Lambeth & Thompson not to raise the mortgage which secured Hunter's note, "until the notes of Jacobs shall be paid in full, and notes divided into four for the same amount." Five days after the date of this receipt, it is shown that Jacobs, and one of the plaintiffs, (Sinnott,) called on Matthews and deposited with him four notes, dated 1st June, 1842, two for the sum of \$2338 13, each payable at nine months from date, and two for the sum of \$2392 50, each payable one year from date, where they were to remain, until Jacobs should "receive a conveyance and titles for

a tract of land and slaves of Wm. Hunter on or near Red River," of which fact Jacobs was to give due notice, and the notes to be then delivered to the plaintiffs. The letter directed to Matthews says, these four notes are given in part consideration of the purchase of said plantation and slaves. After this we do not find either Jacobs or Lambeth & Thompson attempting to prosecute further the pretended sale made on the 4th of June, 1842; but the latter caused an execution to issue on a judgment obtained by the Commercial Bank against Hunter and C. A. Bullard, and under it, the whole tract of land sold by C. A Bullard to Hunter, was, in the month of November, 1842, sold, together with thirtyfive slaves, the crop of cotton, and all the plantation utensils and working cattle, subject to the various mortgages existing at the time in favor of the plaintiffs, as assignees of C. A. Bullard, and of Lambeth & Thompson and others. At this sale, Jacobs became the purchaser of the whole property for \$60,962 67, and the Sheriff made him a deed, which declares that he paid \$4000 in cash, and that the balance of the bid was retained by the purchaser to meet the conventional mortgages shown to exist on the place. On the 27th of February, 1843, nine days after this suit was commenced. Jacobs notified Matthews in writing to deliver to the plaintiff the notes deposited with him, as the conditions had been complied with, according to the agreement. The plaintiffs refused to take them, and on the 13th of March following, Lambeth, acting as the agent of Jacobs, goes to Natchitoches, and, in violation of the stipulation in the receipt of the 22d of June, 1842, cancelled the mortgage in favor of plaintiffs, and delivered up the note. It is also proved, that Lambeth & Thompson and Jacobs, were formerly partners in business; that the former were largely indebted to the latter; that during the time these transactions were going on, they carried on business in the same house, on the same floor; and that the benefit of this speculation was to go to Jacobs and themselves, as he was to give them credit on their indebtedness to him.

The court below gave a judgment for the plaintiffs against Jacobs, for \$16,650 33, with interest at eight per cent, from November, 1842, on \$11,666 66, until paid; and a judgment in favor of Lambeth & Thompson. Jacobs only has appealed.

The appellant's counsel has called our attention to a bill of exceptions taken to the opinion of the court, in admitting in evidence a document marked H, which is a copy of a statement proved by Logan to have been made by him at Lambeth's request, from an original handed to him for the purpose, which copy was given back to Lambeth with the original and was in possession of the plaintiffs at the trial. They made affidavit that they had seen the original in the possession of Lambeth, and called upon the defendants to produce it in court, notifying them that they would otherwise give the copy in evidence. The defendants, Jacobs and Thompson, declared that they had never seen such a paper, did not have it in their possession, and never had; to which statements they offered to make oath. They also stated that Lambeth was absent; that he only could explain the statement; that he would return in about ten days; that they were taken by surprise; and they asked for a continuance. The Judge refused the continuance, admitted the copy of the statement in evidence, and the defendants excepted.

The objection made by the counsel of Jacobs to admitting the copy of the paper in evidence, is, that the original was not accounted for. In overruling this objection, we think the Judge The clerk of the defendants, Lambeth & Thompson, swore that he had given it to Lambeth in the counting-house. We may, therefore, well suppose that it remained there in possession of the firm. When called on to produce the paper, neither Jacobs nor Thompson made any effort to find it. do not seem to have gone to their common counting-house to make a search, nor to have asked for time to do so. They used no diligence to find the original; and we cannot presume that Lambeth excluded them from an examination of the documents and papers in the common office in his absence. They said they knew nothing of this paper; but did not manifest any wish to obtain information, or seek for it. We are also of opinion that the Judge did not err in refusing to continue the case. It was on trial, and the absence of Lambeth, one of the defendants, was no cause for a continuance. He could not have been examined as a witness if he had been present, and his statements could have had no influence, except upon his co-defendants. If the

plaintiffs or defendants in a suit do not fully communicate with each other, and give all the information they possess, their opponents are not to be injured by it. It was no fault of the plaintiffs if the acts of one of the defendants surprised his co-defendants.

The document thus received in evidence, contains a brief statement of the sale from C. A. Bullard to Hunter of the half of the land and slaves, the names of the latter, the price, and terms of payment. It then goes on to state, what slaves had been previously sold by the Sheriff; how many had died; and how many had been sold by Hunter himself. It then gives the appraisement in round numbers; the price bid at the sale on the 4th of June, 1842, say \$18,400; and deducts a previous mortgage of \$1000, showing a balance of \$17,400, as all that was applicable to the two liens of \$11,666 663 each, with interest for about six years on the one held by the plaintiffs, and for two years on the other. What Lambeth orally represented to the plaintiff or his co-defendants we are not informed; but it is a fair inference, that he and Jacobs understood each other, as they lived together, and one acted as the agent of the other in a matter that was to be mutually beneficial to them. The document submitted was calculated to induce a belief that there must be a heavy loss on the notes, and that there had been a sale of the property by the Sheriff. The other testimony shows, that there was a representation as to a difficulty about the title; and, altogether, a case was made out, well calculated to produce an impression that the plaintiffs would have to submit to a serious loss, or to a protracted and questionable suit in a distant parish. It is upon these grounds that the plaintiffs say they were led into error; and we think the evidence supports the allegation. We think both error in fact and motive, are conclusively shown.

We have been favored by the counsel for the defence with voluminous briefs, and long oral arguments, to prove, first, that there was no error in the transaction; secondly, that if there were, the suit should have been brought for a rescission of the sale; and lastly, that there was a legal adjudication to Lambeth & Thompson, on the 4th of June, 1842.

In support of the first ground, it was much relied on, that the first arrangement between Lambeth and the plaintiffs was not

consummated, or was changed, and that they entered into direct arrangements with Jacobs; and that he did not deceive them, nor make any erroneous impressions. Lambeth was the agent of Jacobs in the transaction; he gave all the information, and made the representations calculated to produce the effect; and when that was done, it was easy for the principal to conclude the arrangement. When the relations of Jacobs and Lambeth are considered, as shown by the testimony, it is impossible to doubt that one well knew what the other was doing. If they were Lambeth's representations that deceived the plaintiffs, the defendant Jacobs must abide by them, for he was his agent.

The second ground of defence is not, in our opinion, more tenable than the other. The plaintiffs never pretended that they had made a sale of their note and mortgage to Jacobs, or to any one else. Their allegations are, that by the representations of the defendants they obtained possession of the note and mortgage illegally, and used it for their own benefit, not having given any consideration therefor. The fact of there being a sale, is what the plaintiffs never admitted, but on the contrary, have always denied; and the transaction cannot be so considered. ties do not seem to have considered the transaction as a sale, on the 22d of June, 1842, when Lambeth & Thompson gave their receipt for the note. They call it a settlement; and promise to preserve the mortgage for plaintiffs' benefit. Nor does Jacobs. in his letter to Mathews, say any thing of having purchased the note and mortgage. Nothing in the parol or written testimony induces us to conclude that a sale was made, or that one was intended.

The third point is not, in our opinion, sustained. It is clear that Lambeth did not acquire any rights by his bid made on the 4th of June, 1842, when the Sheriff offered the undivided half of the land and slaves for sale, under the order of seizure obtained by Bludworth & Bullard. He has always contended that the mortgage of Hunter to Lambeth & Thompson, for upwards of \$29,000, with interest, has a preference over that in favor of Bludworth & Bullard, and on this ground refused to pay the amount of his bid. Assuming this to be true, then there are mortgages for more than \$40,000, exclusive of interest, on the property; and

it could not be sold under a younger mortgage, unless a sum exceeding the amount of all anterior mortgages was bid. Only \$1S,400 was bid by Lambeth, which is not one-half the amount which he says has a superior lien and privilege over that of the then seizing creditor. Code of Pract. art. 684. The Sheriff, therefore, had no right to make any adjudication on the bid made on the 4th of June, 1842. But let us suppose that the Sheriff could have sold under the execution of Bludworth & Bullard; then he was right in refusing to complete the sale to Lambeth as he would not pay the price he had offered. In no aspect of the case can that bid confer any right to the property. Code of Pract. art. 689.

But, say the defendants' counsel, their client was not bound to pursue any particular mode of completing his title. This perhaps, may be true; but the particular bid was used for the purpose of imposing on the plaintiffs, and being invalid, it cannot be made effective, and fix the amount the plaintiffs shall receive under their mortgage.

The counsel further urges, that there are various errors in the calculations made by the Parish Judge, by which the amount of the judgment was ascertained. This is probably true; but, as our calculations, made from different data, show that as large an amount should be paid to the plaintiffs, we will not attempt to correct calculations which will not benefit their clients. We are not responsible for the reasons that may induce the inferior judges to come to their conclusions. It is our duty to see if the judgment is correct; and being satisfied that substantial justice has been done between the parties, we will not disturb the judgment.

Judgment affirmed.

Savoie v. Givaudan.

PHILIBERT SAVOIE v. JOSEPH GIVAUDAN.

Appeal from the City Court of New Orleans, Collens, J. Duvigneaud, for the plaintiff.

Pepin, for the appellant.

Bullard, J. This is an action against the drawer of a promissory note made payable to Auguste Grand, and Philibert Savoie, the plaintiff.

The defendant denies his indebtedness to the plaintiff. He admits his signature; but alleges, that the note was given in payment for the schooner Lodoiska, which belonged to himself, the plaintiff, and Grand, the other payee, then in partnership. That a final settlement between the parties has never been made; and he denies that Savoie is the real owner of the note, but that Grand is. He alleges, that the note was transferred to deprive him of any defence which he might have against Grand, who is his debtor.

The evidence shows, that the note was given for the schooner, and that all the parties became bound, either as drawers or endorsers, for the price to A. Ledoux & Co., by the note on which suit is brought. That the partnership was afterwards dissolved by mutual consent, and that Savoie, the plaintiff, retired from the concern, Givaudan and Grand engaging to pay all the debts, and particularly the note in question. That when the note fell due, the plaintiff was compelled to take it up, which he did by giving a new note, in solido, with Grand, which last note he also afterwards took up, and Grand accounted to him for one-half. in an attempt at a settlement between Givaudan and Grand afterwards, the plaintiff was one of the arbitrators; and that it was agreed between Givaudan and Grand, that the latter was to pay the whole of the note. There is no evidence that the plaintiff acquiesced in that arrangement, so as to discharge the defendant. the drawer of the note, from his liability. Whatever may have been the understanding or agreement between Givaudan and Grand as to the ultimate payment of the note, it is clear, that the right of the plaintiff to recover cannot be impaired without his consent, and that consent is not shown.

Judgment affirmed.

The Union Bank of Louisiana v. Hyde and others.

THE UNION BANK OF LOUISIANA v. E. D. HYDE and others.

The holder of a promissory note on which there are several endorsers, is only bound to give notice of protest to the one whom he intends to hold liable. If the endorser so notified wishes to secure his recourse against the others, he must give notice himself, where it has not been done by the holder.

Where in an action against the endorser of a note the holder relies on a promise to pay made after the endorser had been discharged by the lackes of the holder, it is incumbent on him to show that the promise was made by the endorser with full knowledge that he had been so discharged. But an actual payment furnishes a presumption of indebtedness; and where an endorser seeks to recover back the amount of a note on the ground that it was paid by him in ignorance of the fact that he had been discharged, he must show that he was so discharged.

One who alleges error as the basis of his action must show it, or show, at least, that the evidence of it is exclusively in the power of his adversary.

As a general rule, he who affirms must prove; but as there are many negative propositions which it would be impossible to prove directly, the burden of proof, in such cases, is thrown on the opposite party.

Appeal from the Parish Court of New Orleans, Maurian, J. Denis, for the plaintiffs, pleaded prescription against the reconventional demand, citing Civ. Code, art. 3505.

H. H. Strawbridge, for the appellants. Defendants are entitled to recover back the amount of the notes paid through error. the money not being due either legally or naturally. Civ. Code, art. 1887. 17 La. 127. The burden of proving that notice was given so as to bind them is on the plaintiffs; defendants cannot be required to establish a negative. That an endorser's promise to pay, made after his discharge is not binding, unless the holder show affirmatively that the endorser was aware of such discharge at the time, see Ticknor v. Roberts, 11 La. 14. Briggs v. Alnutt, 12 La. 465. Hennen v. Desbois, 8 Mart. 148. Lambeth v. Petrovie, 11 La. 315. 12 Johns. 423. Trimble v. Thorne. 19 Johns. 151. Garland v. Salem Bank, 9 Mass. 408. 4 Mason, 241. 4 Dallas, 109. Prescription does not apply. Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum. Code of Pract. art. 20. 4 Mart. N. S. 499. 2 La. 385.

G. Strawbridge, on the same side.

Bullard, J. This action was commenced on the first of February, 1843, by the Union Bank, as the holder of two pro-

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missory notes drawn by E. D. Hyde & Co., and endorsed by their co-defendants T. R. Hyde & Co., which appear to have been regularly protested, and notice given to the endorsers.

The drawers allege in defence, that about the 8th day of November, 1836, T. R. Hyde & Brother, being the holders of several promissory notes amounting to \$2748 08, did at that time, and on the 6th December, discount said notes in the Union Bank, whereby the plaintiffs became owners of the same. That they were by the plaintiffs remitted to the State of Mississippi, where they were due and payable; but not being paid at maturity were returned to the plaintiffs, and on their demand taken up and settled by the said Hyde & Brother, "who believed the said notes to have been protested, notified, &c.," but said respondents show that in truth and fact it was not so. That the said T. R. Hyde & Brother, on proceeding to obtain payment from the other parties, found that the plaintiffs had so negligently and illegally managed the said affair, that they had totally lost all recourse on any of the parties capable of paying. That the notes have been duly transferred to the respondents, who plead the same in compensation, and pray judgment in their favor for the balance. The endorsers'ioin in this defence.

The Parish Court gave judgment for the plaintiffs, and the defendants have appealed.

It is now so well settled, as not to require a reference to authorities, that the holder of a promissory note, on which there are several endorsers, is not bound to give notice to any except the one whom he intends to hold liable, and that the endorser so notified has no right to complain of the holder, that his previous endorsers were not notified. If he wishes to secure his recourse, he must give notice himself, if it has not been given by the holder. Hyde & Brother in the case set forth in the answer, had no recourse upon the Bank, upon the mere ground that the previous parties had not been duly notified, provided they were themselves notified of the failure of the drawer to pay.

It is equally clear, that the Bank was not acting in this matter as the agent of Hyde & Brother, and therefore, the numerous decisions declaring the liability of banks in consequence of having neglected to give regular notice, have no application to the pre-

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sent case. The only ground, therefore, upon which the defendants can succeed in this reconventional demand is, that Hyde & Brother, their assignors, paid in error when not legally liable themselves as endorsers, in consequence of not having been duly notified of the dishonor of the notes.

If the Bank were now seeking to recover of Hyde & Brother, on the protested notes set up in reconvention, it would be incumment on it to prove affirmatively the notice of protest; and if it relied on the subsequent promise, it would have to show, that such promise was made with a full knowledge that the endorser was discharged by want of notice. Such is the substance of the cases relied on by the counsel for the appellants. 12 La. 465. 11 Ibid. 14. 16 Ibid. 315, and others. But in the present case the endorsers paid and took up the note six or seven years ago, and actually recovered judgment against the drawers; which they could only do by alleging and showing that they had been compelled to take up the note as endorsers, and thereby admitting, both by the payment itself and by the proceeding afterwards against the drawers, their liability. Now, admitting that they cannot be held to do an impossible thing, and to prove that they were not notified, yet they are bound at least to allege it distinctly, so as to put the opposite party fairly on their guard, especially after so great a lapse of time, and when the party complaining never set up any claim, but transferred the notes to others, thus evading one of the modes by which the Bank might have been enabled to prove their liability as endorsers, by an appeal to their consciences by interrogatories on facts and articles. It appears to us clear, that an actual payment furnishes a presumption of indebtedness, although a promise to pay, re integra, as endorser, may not be binding without proof that the endorser knew he was not liable. Hyde & Brother took up the note, and with it the protest, and they are supposed to have in their own possession the notice of protest, if any was given; and with all this, they abstain from asking for any relief against the Bank for many years, and then transfer the note to other persons, to be used in compensation.

But it is said, there is a sufficient allegation of error to put the Bank upon the proof of due notice of protest. The whole of the

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plea must be taken together; and, although the first part states in vague terms that they settled, believing the note to have been protested, notified, &c., when, in fact, it was not so, yet they go on to say that the affair had been managed so carelessly, that they had totally lost all recourse and had failed to recover of the previous parties, thereby clearly intending to charge the Bank. not because no notice had been given to Hyde & Brother, but because the previous endorsers had been released by their negligence. In the case cited from 9 Mass. Rep. 408, the error was elearly shown, and the action brought immediately after the error was discovered; and no other ground for recovery was pretended, except the want of notice to the plaintiff himself. He who alleges error as the basis of action, must show it, or at least show satisfactorily, that the evidence of it is exclusively in the power of his adversary. In Dranguet et al. v. Prudhomme, (3 La. 74,) the court held, as a general rule, that he who affirms must prove, although there are many negative propositions which it is impossible to prove directly, such as the nonperformance or non-existence of things. So where the wife sued to set aside a contract on the allegation that she was not authorized by her husband, it is impossible for her to prove that she was not authorized. It devolved on the opposite party to show that she was, upon her allegation that she was not. But a great majority of cases of error may be shown affirmatively, and it would probably be in the power of Hyde & Brother, in the present case, by producing the protest which was handed over to them by the Bank, together with the note, to show whether or not it had been regularly demanded and notice given to them. It may be, that they took up the note so immediately after its protest, as that its presentation to them to be taken up, would amount in itself to reasonable notice of dishonor, especially when they knew that the previous parties resided in Mississippi, whither it was necessary to send it for collection.

This view of the case renders it unnecessary to examine the plea of prescription.

Judgment affirmed.

Succession of Gourjon.

Succession of Jacinthe Gourjon—E. Léon Bernard, Appellant.

Proceedings in the court from which an appeal has been taken, had subsequently to the judgment complained of, and not embraced in the original record, cannot be noticed.

Where one of two persons designated by a testator to act as his executor in a certain event, presents a petition to the Probate Court to be confirmed as executor, and makes the other a party to the proceeding, and the latter contests his right, and, by a reconventional demand, asserts a better right to the appointment, the former cannot, by withdrawing his petition, defeat the demand of the latter.

The fact that one named as an executor has become a bankrupt since the death of the testator, and before his application to be recognized as such, does not disqualify him. Per Curiam: The law (C. C. art. 1150) contemplates a change in the condition of the executor, after he shall have entered on the discharge of his duties, by becoming a bankrupt, as good ground for removal; but it does not follow that he becomes legally disqualified for a future appointment, by such a change.

APPEAL from the Court of Probates of New Orleans, Bermudez, J.

P. A. Bernard and Roselius, for the appellant.

L. Janin, for O'Duhigg.

Bullard, J. This is an appeal from a judgment of the Court of Probates, refusing to appoint the appellant, Bernard, testamentary executor of the last will of Jacinthe Gourjon. The testator named as his executors, as to his property situated in New Orleans, Messrs. Sauvinet and Zenon Cavelier, and in case of death or absence, Mr. Oduire and Mr. Léon Bernard in their place, giving to each who should discharge the duties of executor, the sum of \$1500.

Cavelier and Sauvinet were first qualified as executors; but on the death of the latter, Auguste O'Duhigg, alleging himself to be the person designated in the will under the name of Oduire, presented his petition to the Court of Probates, praying to be confirmed as such, making Léon Bernard a party. Bernard, thus brought in to show cause why O'Duhigg should not be appointed executor, opposed the demand, denying that he is the person appointed by the will, and alleging that he is himself the person named

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to succeed Sauvinet. He therefore prays, that the petitioner may be held to strict proof of his being the person called *Oduire*, and that, in default of such proof, he, Bernard, may be acknowledged as duly entitled to the trust, and confirmed as such.

At this stage of the cause, the record shows that it came on to be tried, when "after taking testimony, and hearing arguments of counsel, and on motion of counsel for O'Duhigg, his application for letters of testamentary executorship having been withdrawn, the case was submitted to the court, and the court took time to consider."

It having been shown on the trial that Bernard had, since the opening of the will, been decreed a bankrupt under the late act of Congress, the court was of opinion, that the bankruptcy disqualified the applicant, according to a just interpretation and application of art. 2996 of the Civil Code, which relates to agents; of art. 1150, § 2, relating to the suspension of curators, for the same cause; and of art. 324, which authorizes the removal of tutors on the same ground; and of the 1014th article of the Code of Practice, relating to executors. The application of Bernard was, therefore, dismissed. He took the present appeal, and O'Duhigg was made appellee.

An attempt has been made in this case, to bring to our notice proceedings in the Probate Court long subsequent to the rendition of the judgment complained of, with a view of showing that Bernard is not entitled to the executorship, and that, in fact, O'Duhigg has been since appointed and qualified. Instead of answering in this court, his counsel moves that he be made a party thereto in his new capacity of executor, in order to move the dismissal of the appeal, on the ground that none of the legal representatives of the estate of Gourjon, which is to be affected by the appeal, have been made parties thereto; and, in order that the court may not be ignorant of what has taken place since the appeal was allowed, he has filed all the proceedings had in the court below since that period-not a transcript, but the original documents. This is quite irregular, and cannot be countenanced by this court. This cause, like all others, must be tried upon the transcript, and that alone. No new evidence in any shape can be received. O'Duhigg was either an appellee, or he was

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not. If he was not, we should not proceed until he is regularly cited; if he was, it was his duty to sustain the judgment of the court below, according to the evidence in the record. It was not necessary to make any other appellee. O'Duhigg called in the appellant to show cause why he should not be appointed executor. Bernard contests his right, and by a reconventional demand asserts a better right. O'Duhigg, by withdrawing his application. could not defeat the right of Bernard. On the contrary, he left him before the court without opposition. If he chose to retreat from the contest, Bernard was not obliged to follow him. Nor did the court take that view of the matter. The application of Bernard was tried contradictorily with O'Duhigg, the counsel of the latter having given in evidence the decree in bankruptcy, which the Judge considered an insuperable obstacle to his appointment. The only parties who had any interest in this contest for the appointment were before the court, and are now before us. All those documents which accompany the motion to dismiss, cannot, consequently, be noticed by us; and the argument addressed to us, based upon a state of things not shown by the original transcript, can have no influence upon our minds. The motion to dismiss is overruled; and we must consider O'Duhigg before us as appellee, and proceed to test the pretensions of the parties according to the evidence regularly before the court.

The only question which the case presents upon the merits is, whether the fact that an executor named in a testament has become a bankrupt since the death of the testator, and before his application to be recognized in that capacity, be a legal disqualification. We are of opinion the court erred in ruling that it is.

The first article relied on (2996) declares, that the procuration expires by the death, seclusion, interdiction, or failure, either of the agent or of the principal. But it is obvious that article has no application to the appointment in the first instance of a testamentary executor, nor is there any analogy between the two cases. Art. 1150 provides, that a curator may be superseded, if, after his appointment, he has failed or obtained a respite; and a tutor may be removed for the same cause. In all those cases it is the failure which occurs after the appointment has been made,

which disqualifies. But it is clear, that the interests of the estate could not suffer, in consequence of the embarrassments of the person selected by the deceased to execute his last will, when, before he had anything to do with the administration of it, he had been relieved from all previous liabilities by virtue of the law establishing a uniform system of bankruptcy. The law contemplates a change in the condition of the executor, or tutor, after he shall have entered on the discharge of his duties, by becoming bankrupt, as good ground for removal; but it does not follow that he becomes legally disqualified for a future appointment by such a change in his condition previously to his appointment. See Ozanne v. Delile, 5 Mart. N. S. 24.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be reversed; that the appellant be recognized as executor of the last will of Jacinthe Gourjon; and that letters testamentary issue to him upon his taking the oath according to law; and that the appellee pay the costs of this appeal.

MARTHA OXLEY and others v. HENRY CLAY, Testamentary Executor of Nancy Brown.

To ascertain the intention of a testator every part of his will must be considered.

The amount of his estate, the number of persons whom nature has placed so near to him as to make it his duty to attend to their wants, the situation of those who claim to be the object of his bounty, their relationship to him, and their comparative wealth or need, must also be considered, where the language of the testator is uncertain.

APPEAL from the Court of Probates of St. Charles, Labranche, J.

T. Slidell, for the appellants.

H. Clay, Jr. and Preston, for the defendant.

Martin, J. 'The executor of James Brown, the husband of the defendant's testatrix, having obtained in this court a judgment against the plaintiffs, for the balance of the price of a part of a plantation sold by James Brown to J. B. Humphreys, the husband of one of the plaintiffs, and the father of the others, the plain-

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tiffs, stating that J. B. Humphreys was the devisee under the will of Mrs. Brown, of her share in the part of the plantation sold to him by James Brown, obtained an injunction to prevent the payment by the Sheriff to the executor of James Brown of a part of our judgment, corresponding to that of Mrs. Brown in the sale of James Brown to J. B. Humphreys.

The defendant, Clay, pleaded the prescription of ten years; and as res judicata, the judgment of this court in the suit of James Brown's executor against the plaintiffs; (see 5 Robinson, 299;) further, that the will of Nancy Brown did not devise any land to J. B. Humphreys, but gave him only the mere right of claiming a title from James Brown, to that part of the plantation afterwards transferred by the latter to the former, according to an agreement existing between them at the time Nancy Brown made her will, without any intention on her part to release J. B. Humphreys from the payment of the price, and that accordingly, between the date of that will and the death of the testatrix the transfer was made, according to their agreement and the wishes of the testatrix.

The facts of the case are these: soon after the arrival of James Brown and his wife in Louisiana, he purchased a sugar plantation, of which he afterwards sold an undivided third to J. B. Humphreys, his nephew, to whom he committed the management of the estate; the successful administration of which induced the latter, about the period when the former was preparing to leave the State for the city of Washington as a senator of the United States, to design to increase his interest to one-half; and accordingly James Brown and he agreed, that he should have an additional undivided sixth of the estate, for the price of \$18,000. This agreement was not formally committed to writing, though different parts of it are found in the correspondence of the parties. It remained without execution when James Brown and his wife sailed for Europe. On their homeward passage, Mrs. Brown thought it prudent to make an olographic will, which contains the following clause: "My nephew, John B. Humphreys, of Louisiana, having a legal title to one-third part of the estate bought by my husband on German Coast, in Louisiana, consisting in land, negroes, sugar establishments, stock, and other pro-

perty found thereon; and he, the said Humphreys, having since purchased of my husband one other sixth part of said estate, for which he has not yet received a legal title, I do will and devise to him all my interest in such sixth part; and do authorize and request my husband to make him a deed for the said sixth, so that he may hold the said German Coast estate as partner, equal joint proprietor with my husband."

As has been already said, James Brown, soon after his landing, executed a title to the undivided sixth part of the estate to his nephew, for the price of \$18,000, according to their former agreement; and a few months after, his wife died. After his death a part of the price remaining unpaid, and the nephew having died, a suit was instituted by his executor against the present plaintiffs, which terminated in the judgment which the present defendant pleads as res judicata, a plea which the Judge, a quo, has sustained. In our opinion he erred. We clearly indicated a suit against the present defendant, as the only one in which the plaintiffs could avail themselves of the devise of Mrs. Brown, whatever may be their rights under it.

Besides the plea of res judicata, there is the plea of the prescription of ten years, which, the conclusion to which we have come on the last plea of the defendant, renders it unnecessary to examine. This last plea is, that the defendant's, (Clay's,) testatrix did not devise any land to the plaintiff's husband and ancestor, but the mere right of obtaining a deed for the sixth part of the estate to which he had no formal written title.

If our attention had been confined to that clause of the will in which the plaintiffs see a devise, it is not improbable that we would have supported their pretensions; but as it was our duty to do, we have pondered upon every part of the will; and, indeed, upon all the facts of the case as presented in the record of the present suit, and that of the suit the judgment in which has been pleaded as res judicata. We have seen, that the testatrix left a widowed mother and sister, and several other sisters and brothers; that to each of the two former, she bequeathed a life annuity of \$500; that she recommended her other brothers and sisters to the kindness of her husband, and expressed her hope that he would afford them all the assistance which his situation would

enable him to extend to them, leaving them her heirs after the death of her husband, to whom she bequeathed a life estate in her succession. As far as the evidence enables us to judge, J. B. Humphreys, the nephew of her husband, and consequently her's by affinity, was comparatively a man of great wealth; he had been for many years the partner of her husband in the plantation, at first for one-third, and afterwards for one-half, and the manager of it. His residence thereon enabled him to accumulate his revenue, while her husband, long employed as a senator of the United States, and a minister plenipotentiary to France, incurred expenses which very probably absorbed his revenue.

The pretensions of the plaintiffs cannot be sustained, unless we admit, that the testatrix intended for the wealthy nephew of her husband, a larger provision than that which she made for an aged parent, a widowed sister, and indeed for any of her other sisters or brothers. Imagination cannot suggest any ground on which we may conclude that such was her intention.

The will is the compass which must direct courts of justice in seeking the intention of the testator; and that intention when discovered, must direct the decision of the court. It is first to be attempted to be skimmed off the surface of the will. Prominent circumstances are to be considered. The amount of the estate; the number of persons whom God and nature have placed so near the testator as to make it his duty to attend to their wants; the situation of those who, in opposition to these, claim to be the object of the testator's bounty; their relation to him, if any exists; and their comparative wealth or need.

According to this rule, the judge ought to descend into and interrogate his conscience; and the answer which he receives must dictate the judgment he is to pronounce.

We have done so, and find it our bounden duty to say, that the Court of Probates did not err in repelling the pretensions of the plaintiffs.

Judgment affirmed.

EMILE GRANDCHAMPS v. LOUISE MARIE CHLOÉ DELPEUCH and others.

Where the remainder of an inheritance, after deducting the amounts received by some of the children from their father as an advance upon their hereditary shares in his succession, but not declared to be an advantage or extra-portion, is not sufficient for the legitimate portion of the other children, including in the estate of the deceased the property which the children who have received such advance would have collated had they become heirs, the latter, though they have renounced the succession, will be obliged to collate to the amount necessary to complete such legitimate portion. C. C. 1315. The fact that the other heirs have accepted the succession with the benefit of inventory, does not affect their right to claim such collation. Had they accepted unconditionally they would have become personally liable to the creditors of the succession, to whose advantage alone the collation would have enured. The obligation to collate is founded on the equality which should prevail among heirs called upon to divide the succession of their father, mother, or other ascendant, and on the presumption that whatever has been given to a part of them was so given as an advance upon what they might one day expect from the succession of the donor. C. C. 1307, 1309, 1312, 1313, 1491, 1735.

Where a father, who while solvent, had made advances to some of his children upon their hereditary shares in his succession but not as extra-portions, dies insolvent, his estate, so far as his forced heirs are concerned, must be considered as consisting only of the advances so made, and the disposable portion must be calculated on their amount. But the creditors of the deceased have no right to look to such advances for the payment of their claims, as the amounts so advanced did not belong to their debtor at the time of his death.

Where some of the children who had received advances from their father upon their hereditary shares in his succession not made as extra-portions, and who subsequently renounced his succession, are compelled to collate in order to make up the legitimate portion of the other children, they can claim only the disposable portion. Having renounced the succession, they can claim no share in the balance remaining after deducting such disposable portion.

APPEAL from the Court of Probates of New Orleans, Bermudez, J.

Blacke, for the plaintiff. Donations inter vivos, though made by marriage-contract to the husband and wife, or to either of them, are subject to the general rules prescribed for the donations made under that title, and are, at the time of the opening of the succession of the donor, reducible to the portion which the law permitted him to dispose of. Civ. Code, arts. 1727, 1735. The father and mother of the parties having settled jointly on their

daughters, Delpeuch and Foulon, each a dowry of \$3000, without distinguishing the part settled by each of the said parents, the dowry is presumed to have been constituted by equal portions, and is, therefore, to be collated by halves to each of their successions. Civ. Code, arts. 2322, 1320, 1321. This donation inter vivos, by marriage-contract, having been made in advance of their hereditary shares, the donees cannot, by renouncing the succession of their father, relieve themselves from the obligation of collating, the succession being insolvent, and there being no other property to be divided among the heirs than that given in advance by the said marriage-contract. The collation should be made to an amount sufficient to cover the legitimate portions of the two heirs who have accepted the succession with the benefit of inventory, and who would thus be entitled to \$1000 But these heirs are willing to let their two sisters share equally with them, notwithstanding their renunciation, which divests them of their capacity as heirs; and they, therefore, claim only \$750 each, being one-fourth of the mass to be partitioned, viz.: \$3000. See Civ. Code, arts. 1007, 1015, 1315. Toullier, vol. 4, Nos. 471, 342, 343. Even had the donation been made as an advantage or extra-portion, the donees could not, by their renunciation, be dispensed from collating in the insolvent succession of their father, to the full amount of the legitimate portions of the two beneficiary heirs; or, if the said succession were not insolvent and there were property left, besides that given by the marriage-contract as an advantage to be partitioned, then to an amount sufficient to make up or complete such legitimate por-Toullier, vol. 5, No. 144; Civ. Code, arts. 1309, 1312. vol. 4, No. 455. Duranton, vol. 4, No. 250.

J. F. Pepin, on the same side, cited, in addition, Dictionnaire du Droit Civil, par Rolland de Villargues (Brussels ed.) verbo, Reserve, No 25.

Preaux and Soule, for the appellants.

MORPHY, J. This is an action brought by Emile Grand-champs to obtain from his sisters and co-heirs, Louise M. C. Delpeuch, M. E. Foulon, and M. M. Conseil, the collation to the successions of his father and mother, of certain sums of money they have respectively received in advance of their hereditary

shares in such successions. The statement of facts shows, that his sisters, Delpeuch and Foulon, received by marriage-contract, as a dowry jointly settled upon them by their father and mother, the sum of \$3000 each, and that Madame Conseil received, as a part of her hereditary rights in the succession of her mother, \$1500, when she married, and some time after, a further sum of \$150 in advance of her portion in the future succession of her father. The defendants, Delpeuch and Foulon, renounced the estate of François Grandchamps, which is admitted to be insolvent; the two other heirs accepted it with the benefit of inventory. There was a judgment below decreeing the collation to be so made, as to distribute equally among the four heirs, the sums advanced to three of them by their parents. The defendants, Delpeuch and Foulon, have appealed.

There is no dispute with regard to the succession of Louise Marie Grandchamps, to which the appellants admit their obligation to collate the sums they have received from her, the donation to them not being made as an advantage or extra-portion; but their counsel contends that, as they have renounced the succession of their father, they have a right to retain the \$3000 received from him, without being subject to any collation. It is true, that article 1315 of our Code authorizes the heir who renounces, to keep the property he has received in advance of his hereditary rights, and releases him from the obligation of collating; but the same article provides also that, "if the remaining amount of the inheritance should not be sufficient for the legitimate portion of the other children, including in the estate of the deceased the property which the person renouncing would have collated had he become heir, he shall then be obliged to collate up to the sum necessary to complete such legitimate portion."

In the present case, all the property belonging to the late F. Grandchamps at the time of his death, being admitted to be insufficient to pay his debts, his estate, so far as his forced heirs are concerned, may be said to consist, and really consists only, of the donations inter vivos he formerly made to his children. These donations must then form the amount on which the disposable portion is to be calculated. 5 Toullier, No. 144. Rogron, on articles 845 and 922 of the Nap. Code. The deceased having

left four children, the disposable portion is one-third of the sums to be collated. This proportion the defendants are authorized to retain in the same manner as if the donation had been made to them as an advantage or extra-portion; but they cannot surely derive from their renunciation the unjust privilege of keeping for themselves alone the whole of what they have received, when their father left nothing at his death out of which his other children can receive their legitimate portion. The obligation of collating is founded on that equality which should reign among heirs who are called upon to divide the inheritance of their father, mother, or other ascendants, and also on the presumption, that whatever is given to some of them is so disposed of, in advance of what they might one day expect from their succession. Civ. Code, arts. 1307, 1309, 1312, 1313, 1491, 1735. 4 Duranton, Nos. 250, 258, 259. 4 Toullier, No. 455. The circumstances of the succession of his father being insolvent, and of his having accepted it with the benefit of an inventory, presents, in our opinion, no obstacle to the plaintiff's right to call upon the appellants to collate. The donations made by the deceased to his children, when he was in more affluent circumstances, constitute a fund which the creditors have no right to look to, as it did not belong to their debtor at the time of his death. He had made these donations long before, and, for aught that appears in the record, had a perfect right to make them. In order to exercise his claim for collation against the defendants, the plaintiff was under no obligation to accept unconditionally a succession overburthened with debts, and thus endanger his own property. Had he taken such a step, he would have become personally liable to the creditors of the estate, to whose advantage alone the collation would then have enured; whereas, by accepting with the benefit of an inventory, the plaintiff has, without danger to himself, preserved his quality of heir, without which he could not have called upon the defendants to collate. But it is next argued, that if the appellants are not entitled to the whole sum of \$3000, they should, at least, have and retain, in addition to the disposable portion, a share equal to that of the other heirs in the balance remaining. This pretension is entirely inadmissible. Having absolutely renounced the succession of their father, the appellants

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have become strangers to it, and can claim no share in the legitimate portion reserved to the heirs alone. Were it otherwise, they would, by renouncing the estate, have secured to themselves that which they could not have obtained by accepting it, unless the donation had been made to them as an advantage or extra-portion, which is not the case here. They are clearly then entitled to no more than the disposable portion. This would give to each of the appellants only one-sixth part of the \$3000 to be collated, while the judgment below allows them a portion equal to that of the two other heirs, to wit, one-fourth of that amount; but of this, the latter do not complain, as it was so decreed on their own demand, that their sisters should be placed upon a footing of perfect equality with themselves.

Judgment affirmed.

RICHARD M. CARTER v. ANDREW HODGE.

Where plaintiff sues before maturity, on a written promise of defendant to pay him a certain amount at a future period, and introduces no proof that the amount was payable, as alleged by him, at an earlier period, he must be nonsuited.

APPEAL from the Commercial Court of New Orleans, Watts, J. Anderson, for the appellant.

L. Peirce, for the defendant.

BULLARD, J. The plaintiff sues upon a memorandum dated June 28, 1839, which he alleges was so dated instead of January, 1839, either by mistake or design, by which the defendant promises to pay him \$2000, two years after date. The petition was filed on the 28th January, 1841.

The defendant, after setting up an exception which was overruled, pleaded to the merits. He alleges, that the plaintiff is not in possession of the obligation sued on, nor is he authorized by any person in possession of it to bring suit; but that the plaintiff had previously transferred said memorandum to the Exchange and Banking Company. He next sets forth a species of partnership between himself and the plaintiff in relation to the purchase Vot. VII.

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and sale of lands, in consideration of which the memorandum was given, which, however, it is not necessary now to detail, inasmuch as the cause was decided in the court below upon other grounds.

Brenan, the cashier of the Exchange Bank, being served with a subpæna duces tecum, produced the memorandum, and at the same time intervened on the part of the Bank, and claimed the note as its property by endorsement, denying the plaintiff's right to sue for the same.

There was judgment of nonsuit, and the plaintiff has appealed.

There is no evidence in the record that the memorandum was by mistake dated in June instead of January, and consequently the same was not due when this suit was brought. The court, therefore, did not err in giving a judgment of nonsuit.

Judgment affirmed.

WILLIAM H. MERRITT v. W. L. BURGESS.

The fact that the thing sold remains in the possession of the vendor is a badge of fraud, and throws upon the vendoe the burden of proving the reality of the sale; and this even where the vendor has reserved to himself the asufruct, or retains the possession by a precarious title. C. C. 2456.

APPEAL from the District Court of the First District, Buchanan, J.

Crawford, for the appellant.

McKinney, for the defendant.

Bullard, J. The plaintiff sues for a female slave named Susan, in possession of the defendant. He sets up title under a sale from W. Finnall, by act before a notary dated the first day of May, 1841.

The defendant alleges, that he is the true and lawful owner of the said slave. That the sale set up and pretended by the plaintiff, is false, fraudulent and simulated; that the slave continued to remain in the corporal possession of Finnall, who continued to act as owner, until he sold and delivered her to the defendant;

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that the sale to Merritt was a mere sham, and done in order to impose upon, and cheat and defraud the defendant, or any other person that Finnall might be able to sell the slave to; and that the plaintiff was in collusion with him.

The defendant gave in evidence, a sale of the slave by the same Finnall, bearing date August 1st, 1841. It is further shown, that the girl was delivered to the defendant, by the vendor, and that from the time of his previous sale to the plaintiff, which had been duly recorded in the office of the Register of Conveyances, she had not ceased to be in the possession of Finnall.

The court below gave judgment for the defendant, and the plaintiff has appealed.

His counsel has contended in this court, that his purchase of the slave was bona fide; that the conveyance was registered, so as to give notice to the whole world; that, living in the same house with the vendor, there was sufficient evidence of a delivery; and that when the plaintiff left the city for Virginia, the servant was left in charge of Finnall, as agent.

On the other side it is urged, that there is no evidence of a delivery; that Finnall remained always in possession; that the plaintiff, it is true, was for a short time the bar-keeper of Finnall; but, that it does not appear how long, nor is it shown why, he left the servant in possession of Finnall, on his departure for Virginia; and that in such cases the presumption is against the validity of the sale, and that it is simulated or fraudulent; and he relies upon the decision of this court in the case of *Thibodeaux* v. Thomasson et al. 17 La. 353.

The record discloses a circumstance which tends to throw suspicion over the transaction. On the 29th day of April, 1841, only two days before the sale to Merritt, Finnall executed a power of attorney before a notary public, by which he constituted one Gano of Cincinnati, his agent, with authority to emancipate the same slave, according to the laws of Ohio; and, on the 15th May, he procures a copy of the power of attorney, and has it duly certified by the Governor, under the seal of the State.

The fact that the thing sold continues to remain in the possession of the vendor, is regarded as a badge of fraud, and throws

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upon the vendee the burden of proving the reality of the sale. Civ. Code, art. 2456.

This principle applies even where the vendor has expressly reserved the usufruct, or remains in possession by a precarious title.

In the present case, the vendee has not removed the presumption, by proving that the contract was for a valuable consideration; but it is fortified by the fact, that he was in the employment of the vendor, and that when he left the State, the slave still continued in the possession of Finnall; and there is no evidence to show that she was hired to him.

We are not authorized to conclude that the Judge erred in deciding that the first sale was simulated.

Judgment affirmed.

Succession of Rosine J. Rouzan-Jean Fleming, Natural Tutor, and another, Appellants.

A petition may be amended with the leave of court after issue joined, provided such amendment do not alter the substance of the demand. C. P. 419. Leave to amend is in the discretion of the court.

Where petitioners pray that a will may be set aside, but in case it be sustained, that certain legacies may be delivered to them, on their performance of the conditions imposed by the testator, which they thereby offer to perform, they cannot amend by striking out, or discontinuing their offer to accept the legacies under the conditions imposed by the will.

APPEAL from the Court of Probates of New Orleans, Bermudez, J.

Hennen, S. L. Johnson, and L. Janin, for the appellants. Beauregard, and C. Janin, contra.

MARTIN, J. The petition states, that the late wife of one of the appellees, and now the testratrix of both, made an authentic will, by which she left several legacies to the petitioners, and that the appellees caused a paper purporting to be her will under private signature, to be proved, by which the authentic will is so far revoked, as to annul the legacies to them. The same legacies are given to them by the private will, but under the condition that

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they shall renounce a claim which they have against one of the appellees, as syndic of John Fleming. The petitioners urge, that the private will is null and void, the testatrix not having a perfect use of her mental faculties, when she made it; that it was not made in the manner required by law; and that they are not bound to accept the aforesaid legacies, burthened with the condition under which they are given in the private will.

The petition concludes with a prayer, that the authentic will may be declared the last will and testament of the testatrix, and that the private one may be declared null and void, and set aside; and that the legacies aforesaid may be unconditionally delivered to them. But should the court sustain the private will, and set aside the authentic one, they pray that, on their performance of the conditions in the private will, which in such case they offer to perform, the said legacies may be delivered to them.

The appellees pleaded the general issue, and several other pleas, which the view we have taken of the case renders it unnecessary to notice.

The Court of Probates sustained the private will; but, considering that it confirms the authentic one under which the petitioners are unconditional legatees, under the condition of their renunciation to their claim against one of the appellees, which condition the petitioners offered to perform, ordered the delivery of the legacies to them.

The petitioners appeal. Their counsel have drawn our attention to a bill of exceptions which they took to the opinion of the court, refusing them leave to discontinue that part of the petition in which they offer to accept the legacies, under the condition with which they were burthened in the private will.

The Code of Practice authorizes amendments after issue joined, provided the substance of the demand be not altered by making it different from the one originally brought. Code of Pract. art. 419. In the case of Benoit v. Hebert et al. 1 La. 212, we held, that leave to amend is in the discretion of the court. It does not appear to us, that the discretion of the Court of Probates was incorrectly exercised, in refusing leave to discontinue. The discontinuance would have been an amendment of the petition, which would have changed the nature of part of the demand, to

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wit, that which asked a delivery on a condition offered to be performed, into a demand for an absolute and unconditional delivery.

On the merits, the evidence shows the perfect sanity of the testatrix, and the compliance with all the formalities required by law in the execution of a private will.

Judgment affirmed.

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PETER PAUL CLOSSMAN v. THEOPHILE BARBANCEY.

A plaintiff, who instead of submitting his case to the jury on the evidence received, moves for a nonsuit with leave to set it aside, may appeal from a decision of the court refusing to set aside the nonsuit and grant a new trial. Per Curism: Such a mode of proceeding is a convenient way of bringing up for the decision of the Supreme Court incidental questions, without going into a trial on the merits of the case.

Complete mutuality or identity of all the parties is not necessary in order to admit depositions of an absent witness taken in a former suit. It is generally sufficient if the matters at issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness.

Proceedings under a rule, not connected with the suit, taken by plaintiff against defendant and yet under advisement, are inadmissible in evidence, where it is not shewn that the witnesses examined on the rule are absent, or that their attendance cannot be procured.

A deposition made by a party in an action which he had brought as a syndic, is admissible in evidence in an action in which he is sued both individually and as syndic. Per Curiam: Extra-judicial statements made by the defendant would be good evidence in support of a personal demand against him; a fortiori, his testimeny taken in open court should be received. How far such testimony is to affect those whom he represents as syndic, is a question which goes more to the effect, than to the admissibilty of the evidence.

APPEAL from the Parish Court of New Orleans, Maurian, J. L. Janin, for the appellant.

Castera, for the defendant.

Grivet, for the absent creditors of Huberson, by appointment of the court.

MORPHY, J. The present suit was preceded by two others brought for the same cause of action. The first was a personal action against the defendant, begun in the Parish Court, No.

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The trial had proceeded for some time, and a good deal of testimony had been taken, when the plaintiff discontinued, and immediately instituted a new suit in the Commercial Court. This last suit was dismissed on a plea to the jurisdiction of the court, which was sustained by this tribunal. 2 Robinson, 346. The plaintiff then brought the present action, the facts of which are fully stated and may be seen in the report of the case brought up from the Commercial Court. It differs from the first suit. which was discontinued, only in this, that the defendant is now sued in two distinct capacities, to wit, as syndic of the creditors of Huberson, for the recovery of the goods and merchandize claimed by the plantiff, or their value, and, individually for damages; and that he is charged in the present suit, with having procured by fraud and perjury the surrender of Huberson, and his own appointment as syndic. On the trial of the cause, three bills of exceptions were taken by the plaintiff, who instead of submitting his case to the jury on what evidence had been received, moved the court for a nonsuit, with leave to set it aside, and from the refusal of the Judge to set aside the nonsuit and grant a new trial, the present appeal was taken which, therefore, presents no other questions but those involved in the bills of exceptions. In the case of Foley v. Dufour et al., we had occasion to consider this mode of proceeding. It is a convenient way of bringing up for our decision incidental questions, without going into a trial on the merits of the case; and we held, that if on a hearing of the motion to set aside the nonsuit, the party believes himself aggrieved by the decision of the court, nothing prevents him from seeking relief by an appeal. 17 La. 521.

I. The plaintiff's first bill of exceptions was to the rejection of the deposition of one F'. Goursac, (in Europe at the time of the trial,) which had been taken under a commission in a suit of Barbancey, Syndic, v. J. & L. Garnier. The bill of exceptions states, that this testimony was given in evidence, both in the last mentioned suit in which the commission had issued, and in the former suit of Clossman v. Barbancey, No. 15,086; that the two cases were tried together, under an agreement of counsel that all the testimony taken should be used in both cases as if taken in each of them, with the exception of such testimony or documents as should be mentioned as relating to one case only;

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that under this consent the testimony was received, and was marked by the clerk as having been received in both cases; and that the issue in the former suit, No. 15,086, is the same as that presented in the one on trial. But the testimony was excluded on the ground, that Goursac's deposition was taken under a commission issued in the suit of Barbancey, Syndic, v. J. & L. Garnier, and not in that of Classman v. Barbaneey, which suit was discontinued, and that the said deposition was introduced on the trial of the case thus discontinued, only because that case was tried together with the other; and also on the ground, that in the former suit of Clossman v. Barbancey, the defendant was sued in his individual capacity only, while he is now sued both in his individual capacity and as syndic of the creditors of Huberson. It does not appear from the transcript before us, that the commission under which Goursac's testimony was taken, was marked as having been given in evidence in both suits, as stated in the bill of exceptions; but on examining the pleadings in the suit of Barbancey, Syndic, v. J. & L. Garnier, which are annexed to the bill of exceptions, it appears, that the matters in dispute were partly the same in both suits, and that J. & L. Garnier, who were personally sued, rested their defence on the ground that they were only the agents of Clossman, and adopted as a part of their answer all the allegations and averments of their principal Clossman, in his suit against Barbancey, No. 15,086, thus making analogous issues in both suits, which the parties afterwards agreed to try together. The rule applicable to cases of this sort, is thus laid down in Greenleaf's Treatise on Evidence, p. 589: "With respect to depositions, complete mutuality or identity of all the parties is not required. It is generally sufficient, if the matters in issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness." The deposition in question comes, we think, within the above rule, which appears to us a reasonable one, and it should have been admitted.

II. The second bill of exceptions was taken to the refusal of the Judge to permit the plaintiff to give in evidence certain proceedings had on a rule he had taken against the defendant, to remove him from his office of syndic, and make him pay twenty

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per cent damages, on the ground that he had not deposited the funds of the estate in bank. The Judge, in our opinion, did not err. Admitting that the evidence offered was not irrelevant under the pleadings, it was not shown that the witnesses heard on the rule were absent, or could not be procured. The proceedings were, moreover, posterior to the institution of this suit, had been instituted by the plaintiff himself, and the rule was yet under advisement.

III. The third bill of exceptions was to the opinion of the Judge excluding a deposition given by the defendant Theophile Barbancey himself in open court, on the trial of the two cases of Barbancey, Syndic, v. J. & L. Garnier, and Clossman v. Barbancey, under the consent entered into by the parties. The reason given by the Judge was, that Barbancey was a party to the suit in which his testimony was taken, only as syndic, and that he is a party to the present suit in a double capacity, to wit, individually and as syndic. The Judge, in our opinion, erred. It is clear, that extra-judicial statements of Barbancev would have been good evidence in support of the personal demand made against him in this suit. If so, his testimony taken in open court in the suit of Barbancey, Syndic, v. J. & L. Garnier, should, a fortiori, be received. How far it is to affect those whom he represents in this case as syndic, is another question, which goes more to the effect, than to the admissibility of the testimony.

It is, therefore, ordered, that the judgment of the Parish Court be reversed, the nonsuit set aside, and the case remanded for further proceedings below, with instructions to the Judge of that court, not to exclude the depositions of Goursac and T. Barbancey. The appellee to pay the costs of this appeal.

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JOHN McDonogh v. James Calloway and others.

An order having been granted enjoining defendants from obstructing a passage way alleged to be necessary to the use of houses belonging to the plaintiff, the latter subsequently took a rule on defendants to show cause why the obstructions which prevented the free use of his property, should not be immediately removed at their expense. Plaintiff having appealed from a judgment refusing to order the removal of the obstructions until the case could be tried on the merits, on a motion to dismiss the appeal on the ground that the judgment was not a final one, nor the injury irreparable: Held, that an appeal will lie; that the judgment is final so far as it relates to the immediate removal of the obstructions; that it is not indispensably necessary to entitle a party to appeal from an interlocutory judgment, that the injury should be absolutely irreparable, it being sufficient that it may become so; and that the obstruction of a passage, by which a party can get in or out of his house is, in its immediate consequences, so serious an injury, as to be considered irreparable.

Where an injunction has been obtained to prevent defendant from obstructing the petitioner in the free use of a common passage way, on proof that the obstruction which existed at the time the injunction was sued out has not been removed, the court may order it to be removed at once by the Sheriff, without waiting for a trial on the merits.

An injunction may be directed to parties or to public officers to compel them to do certain acts, as well as to restrain them from acting. It is as effective to enforce a right, as to prevent a wrong. Thus an injunction may issue to compel the removal of an obstruction in a common way. C. P. 298.

APPEAL from the Parish Court of New Orleans, Maurian, J. Grivot and Roselius, for the appellant.

Bartlette, J. E. Jones and G. Strawbridge, for the defendants.

Garland, J. The petitioner represents, that he is the owner, and has long been in the quiet possession of a lot of ground situated on New Levée street, with all the rights, ways and servitudes thereunto belonging. That said lot fronts on a common passage or alley, about six feet in width, the use of which is necessary to the enjoyment of the property; which passage was laid out, running from Tchoupitoulas street to New Levée, by the former proprietor, as will appear from a plan on file, on which it is marked as common. The petitioner annexes to his petition, as a part thereof, the act of sale to him of the property, which refers to the plan, and sets forth the boundaries, rights

and uses which he has on such common way or passage, and which shows that he has more than one hundred feet of ground bounded by said common way. He then states that the defendants have illegally and wrongfully fenced up said common way, so as to prevent him and his tenants from having any ingress or egress to or from the buildings on said passage, to his great damage. says, that the defendants, notwithstanding his amicable request, illegally persist in keeping up said fence and obstructions whereby irreparable injury is caused to him. He therefore prays, that the Judge will order the obstructions to the use of said passage to be immediately demolished and removed; that an injunction may be issued commanding and enjoining the defendants not to disturb him, (the petitioner,) in the free use and enjoyment of said common way or passage; and that, after hearing the parties, the injunction may be made perpetual, and the defendants condemned to pay the damages claimed.

The allegations in the petition are sustained by the affidavit of the party, and by the deed of sale annexed to and made a part of the petition. The Judge gave an order enjoining the defendants from disturbing the plaintiff in the free use and enjoyment of the common passage described in the petition, upon bond and security being given to pay all the damages defendants may sus-Several days after this order was given, the plaintiff made an affidavit, and asked for a rule on the defendants to show cause why they should not be punished for contempt, and why the obstructions to the common way should not be immediately pulled down, at their cost and expense. The affidavit states, that the obstructions to the common passage continue, and that the plaintiff is prevented from using his property freely and without disturbance. The Judge, upon a hearing of the rule, said that, as it appeared the defendants had done no act since his last order, but had remained quiet and permitted the fence to stand, and as the writ of injunction was a preventive one, the defendants had not been guilty of any contempt of his authority. That as to ordering the obstructions to be demolished, he could not do so, until he heard the parties on the merits; wherefore he discharged the rule; from which judgment, as well as from the original order or decree, the plaintiff took an appeal.

By the prima facie case presented by the plaintiff, he shows, that he is the owner of a lot having a front of more than one hundred feet on a way or passage laid off more than twenty years previously as common; that without its use there is no ingress or egress to or from the houses on said passage, and that the occupants cannot get in or out; that the defendants, without any legal authority, have fenced up and obstructed said passage, and that those obstructions continue to the injury and inconvenience of the plaintiff and his tenants, who are deprived of the free use of the property.

The appellees have moved to dismiss this appeal, because there is no final judgment, and the injury is not irreparable. We do not think this motion should prevail. The injury is of so grave a character, as that it may become irreparable by longer delay. In 6 La. 435, it was held, that it was not indispensably necessary to entitle a party to an appeal from an interlocutory judgment, that the injury should be absolutely irreparable; it is sufficient if it may become so. In the case before us, the judgment is so far final as relates to the immediate removal of the obstructions; and it appears to us, that the obstruction of the passage by which a party can get in or out of his house, is an injury which, although it may be finally remedied, is in its immediate consequences so serious, as to be considered irreparable. See 9 Mart. 519. 2 Rob. 342.

It is urged by the appellant, that the Judge erred in not granting the order as prayed for in the petition. To this the appellees have replied, that an injunction is not the proper remedy, when the object is to direct a party to perform a particular act; and that if it be, the order cannot be made to the extent required, before hearing the parties on the merits.

An injunction is a remedial writ which courts issue for the purpose of enforcing their equity jurisdiction; and among the numerous purposes specified in which it is to be issued, the suppression of public and private nuisances is mentioned, and the darkening or obstructing ancient lights is put as an example. 1 Maddock's Ch. 156. Eden on Inj., ch. 11. Bouvier's and Tomlinson's Law Dictionaries, verbo, Injunction. The writ may be directed to parties, or to public officers, enjoining or commanding

them to do certain acts or things, or to abstain from doing them, and is as effective in enforcing a right as in preventing a wrong or injury. Our Code of Practice, article 296, calls it a mandate to prevent acts that may be injurious to a party, or impair a right It may be directed to a party in the suit, or to third persons not parties. Art. 297. Among the first examples given by article 298, in which the writ is to issue, is that of the obstruction of a place of which the public has the use, such as constructing, either in the bed of a navigable river, or on its banks, works which may prevent the navigation of such river, or render it more difficult, or prevent ships or other craft from easily landing and unloading on the bank of such river. Many other cases are mentioned in the article, which it is not necessary to recapitulate. It is a fact well known, that the navigable streams leading to some of the most populous and fertile sections of our State, are very narrow, and that their navigation may be completely obstructed in a few hours, by a single person, either by felling trees into them, or by sinking the hull of a boat or other vessel. An individual, under a pretence of right, or wantonly, takes the necessary means to obstruct entirely the navigation, and thereby prevents a large number of people from transporting their produce to market, and otherwise seriously injures them. The courts hold their sessions in the country but once in six months; and if the doctrine be correct, that a Judge cannot order the obstructions to be immediately removed, a whole community must suffer, until a trial can be had on the merits of the case. lic road may be barricaded in the course of a single night; one of the principal streets of a city may be closed in a few hours; the use of a wharf or landing place may be easily destroyed; and a pretence of right may be set up to do anything; but it cannot be permitted to one, two, or three individuals to take the assertion of their real or pretended rights into their own hands, and thus injure a considerable portion of the community. torious to all acquainted with the city of New Orleans, that there are many small streets for public use, and alleys or passages common to the proprietors or occupants of many adjoining tenements, and that the use of such ways or passages are indispensable to the enjoyment of the houses and tenements; and can it,

with any propriety, be said, that a single person may, at pleasure, stop up such a street or alley, and prevent the people from getting in or out of their houses, and that a court has no power to order the obstructions to be removed, or the way opened until a trial can be had at the end of a year or more, upon the merits of the case? The law has not left parties remediless in such cases, nor the courts powerless for the correction of such evils; and we think the Judge below should at once have granted an order, to have the obstructions to the use of the common passage removed by the Sheriff.

In consequence of the time that has elapsed since this appeal was taken, the question now before us is, in fact, one of costs; as it has been stated during the argument, and admitted, that the obstructions have been removed, under an order or judgment of the court rendered since the appeal was granted. We shall, therefore, only give such a judgment as will compel the appellees to pay the costs, believing that at the time the appeal was taken there was sufficient ground for it.

It is, therefore, ordered and decreed, that the original judgment or order of the court below, so far as it refused an order to the Sheriff to demolish and remove immediately, the fence and obstructions in the common passage mentioned in the petition, be so amended as to grant said order. In other respects the orders or judgments are affirmed, without prejudice to the rights of any of the parties on the merits. The appellees are condemned to pay the costs of this appeal.

The State v. The Atchafalaya Railroad and Banking Company.

THE STATE v. THE ATCHAFALAYA RAILROAD AND BANKING COMPANY.

To support the plea of res judicata, the parties to the two suits and the question presented must be the same.

Plaintiff having obtained an order directing defendants to sell for cash certain property mortgaged to him, subsequently took a rule on the latter to show cause why they should not be punished as for a contempt for disobeying the order of sale. There was no opposition to the order of sale, nor was any appeal taken from it. Defendants in answer to the rule, having alleged their willingness to comply with the order, but suggesting that the sale ought not to be made for cash, the court directed it to be made on the terms suggested by the defendants: Held, that the court had no authority to set aside its first judgment but on a regular opposition.

APPEAL from the District Court of the First District, Buchanan, J.

Rawle, for the appellant.

Hoffman, for the defendants.

Bullard, J. The appellant, Fowler, having purchased at a sheriff's sale, sundry promissory notes given by the Atchafalaya Bank, the payment of which was secured by mortgage on real estate in New Orleans, which notes were sold as the property of the Bank of the United States of Pennsylvania, obtained from the District Court of the First District an order to the commissioners for the liquidation of the Atchafalaya Bank, to advertise forthwith and sell the mortgaged premises, after an advertisement of thirty days, for cash, without appraisement, according to the agreement of the parties. This order or judgment, which was given on the 5th day of August, 1843, has never been reversed or set aside. The commissioners, however, apparently paying no attention to it, Fowler, on the 5th of September, took a rule on them to show why they should not be punished for disobeying the order of the court.

The commissioners, in answer to this rule, profess their will-inguess to obey the order of the court; but suggest, that the property ought to be sold for the notes of the Bank of the United States of Pennsylvania, inasmuch as Fowler has no greater rights than that Bank had before the sale of the notes; and they pray for an order to that effect.

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The judgment upon this rule was, that it be dismissed; but the commissioners were authorized to advertise the premises for sale for cash, or the notes of the Bank of the United States at the option of the purchaser. From this judgment an appeal was taken, but not prosecuted in time.

Finally, on the 16th of November, another rule was taken on the commissioners, to show cause why they should not proceed to sell the mortgaged property for cash, according to the original order. To this rule the commissioners answered, that the whole matter had been adjudged upon the first rule, which judgment they set up as res judicata; but they say, that if that plea be overruled, they are ready to advertise and sell the property in manner and form as was first ordered by the court, which order, they say, is still in force.

After a trial upon this last rule the court sustained the plea of res judicata, and the petitioner again appealed; and this is the appeal now before us, the first having been abandoned.

We are of opinion that the court erred. The original order to sell the property for cash, according to the terms of the contract, was still in force, and so admitted to be by the commissioners. The only question presented to the court was, whether the commissioners should be punished for disobeying the order. No issue was joined upon any other question. In order to constitute the authority of the thing adjudged, it is not only necessary that the parties should be the same, but the same question must be presented by the pleadings. The court had no authority to set aside its first judgment, without any regular opposition. The commissioners had no interest in contending that the price of the property should be paid in the bank notes of the Bank of the United States, any more than in Fowler's own notes. It is not pretended they had any such funds as an off-sett to the claim. The plea of res judicata ought in our opinion to have been overruled, leaving the first order in full force.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, that the exception of res judicata be overruled, and that the case be remanded for further proceedings according to law, the appellees paying the costs of the appeal.

Garnier and another v. Lombard.

JOHN GARNIER and another v. JOSEPH LOMBARD.

APPEAL from the Commercial Court of New Orleans, Maurian, J., presiding.

L. Janin, for the plaintiffs.

Labarre and Canon, for the appellant.

MARTIN, J. The plaintiffs having taken an order of seizure and sale against certain property mortgaged to them, became the purchasers of it from the Sheriff; and, by a monition, sought and obtained the homologation of the sale.

Zeringue, the curator of the estate of the wife of Lombard, the mortgagor, is appellant from the judgment, and the plaintiffs and appellees have prayed for the dismissal of the appeal.

The appellant has contended, that the mortgagor's wife having died and left children before the executory process was sued out, these heirs should have been made parties by the petition for the order of seizure and sale.

The appellees' counsel has replied, that there is no evidence of the alleged facts; that if they were proven, the appeal could not be sustained; that the appellant's counsel assumes, that the property mortgaged was community property, and that it is now settled that in order to set up such a claim by the heirs of the wife, a settlement of the community must be shown. His Creditors, 14 La. 458. Wilcox v. His Creditors, 2 Rob. 30, and Fortier v. Slidell et al., just decided, ante, p. 398. moreover, the act of mortgage, which, is in evidence, contains the clause de non alienando. If, therefore, Lombard had parted with the property by private sale, the proceedings might yet have been instituted against him, without making his vendee a party; and that a transfer of a contingent part interest could not affect the rights of the creditors any more than a complete and recorded sale, or impose upon them the obligation of citing Lombard's heirs, or of going with their claim into the Probate Court; and that if the appellant, or those he represents, had possessed any right to this property, they would be bound by the homologation of the monition.

It is perfectly useless for us to notice the argument, by which Vol., VII. 57

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the appellant's right to appeal is supported, because all the facts on which his arguments rest are gratuitously assumed, and no steps have been taken to establish any of those facts.

The appeal must, therefore, he dismissed.

FRANÇOIS DUFOUR v. JOSEPH LOMBARD.

Where there is no statement of facts, assignment of error, or bill of exceptions, and the record shows that it does not contain all the evidence upon which the case was tried below, the appeal must be dismissed.

Appeal from the Commercial Court of New Orleans, Watts, J. D. Seghers, for the plaintiff.

Labarre and Canon, for the appellant.

Martin, J. The dismissal of the appeal is asked on an averment that the transcript does not enable us to revise the judgment.

We have a certificate from the Judge, and another of the clerk. The first attests, that the transcript contains all the evidence adduced, except such as is mentioned in the clerk's certificate; and we are informed by the clerk, that the transcript contains all the evidence, except that mentioned in the minutes of evidence.

It is clear, that some of the evidence is not before us, and we cannot revise the judgment without being in possession of every part of the evidence on which it was given. There is no statement of facts. Our attention has not been called to any part of the record, by any assignment of error or bill of exceptions.

The appeal must, therefore, be dismissed.

The Mechanics and Traders Bank of New Orleans v. Walton and another.

THE MECHANICS AND TRADERS BANK OF NEW ORLEANS v. 52 1639 MARK WALTON and another.



A judgment is inchoate only, and no appeal lies from it, until signed by the judge. Where on an appeal from a judgment confirming one taken by default against an absent defendant as endorser of a bill of exchange, the record shows that no evidence was introduced to establish the agency of the person on whom the citation was served, nor to prove the signature of the defendant or a demand and notice of protest, the judgment must be reversed.

The testimony of a witness that he gave defendant legal and timely notice of the protest of a bill, is insufficient to prove notice. Per Curiam: A notary, or other person called to prove a notice of protest, must state the time, manner, and circumstances under which the notice was given, that the court may judge of its sufficiency. He is not to take upon himself to decide upon its sufficiency.

A promise by an endorser to pay the amount of a bill exceeding five hundred dollars, made after protest, is an agreement to pay money, which, under art. 2257 of the Civil Code, must be proved by one credible witness, and other corroborating circumstances appearing aliunds.

APPEAL from the District Court of the First District, Buchanan, J.

L. Peirce, for the plaintiffs.

Lockett and Micou, for the appellants.

MORPHY, J. A motion to dismiss this appeal is made on the ground, that it was taken more than one year after the judgment was rendered. The record shows, that the petition of appeal was filed on the 9th of November, 1843, and that the judgment appealed from was rendered on the 8th, and signed on the 12th of November, 1812. The counsel for the appellees contends, that according to art. 593, and several others of the Code of Prac tice to which he has referred, the year allowed for appealing must be computed from the day when the final judgment was rendered, and not from that on which it was signed. Arts. 546, 547, 548, 558, 561, 565, 567. This court held otherwise in Cooley v. Seymour, 9 La. 275. We then said: "A judgment is inchoate only, and no appeal lies from it until it is made perfect by receiving the signature of the Judge. No prescription runs against a party, before he has acquired the faculty of acting and asserting his rights." Although, in several articles of the Codes, judgments, as soon as they are pronounced or rendered, are called The Mechanics and Traders Bank of New Orleans v. Walton and another.

final judgments, we have held that they are not so in all respects, and cannot be appealed from until they are signed. 5 Mart. N. S. 105. 7 La. 512. Were we to adopt the literal construction of art. 593 contended for, it would lead to the preposterous result, that if a Judge were to neglect signing a judgment during one year after it was rendered, the party cast might lose by prescription his right of appeal, without ever having had the faculty of exercising it. This construction violates the well known rule, contra non valentem agere non currit præscriptio.

This action is brought against the defendants as endorsers on two bills of exchange of \$3300 each, drawn to their order on Walton & Fullar, of New York; and the petition contains the usual averments of demand, protest and notice. There was a judgment taken by default below, and confirmed in due course of The transcript before us is certified by both the Judge and the clerk of the District Court, as containing all the evidence adduced on the trial of the cause. We are, therefore, bound to believe that none other was given. The appellants have assigned for error apparent on the face of the record, the insufficiency of the evidence on which the judgment by default was confirmed. It does not establish the agency of J. B. Walton upon whom the Sheriff's return shows that service of the citation was made, as being the agent of W. H. Walton, one of the defendants, who was absent; nor does it prove the signatures of either of the defendants, or notice of the demand or protest to them as endorsers. A witness testified, that on the return of the drafts under protest, he gave defendants legal and timely notice, and that they promised to make arrangements for the payment of the same. tary, or other person called as a witness to prove a notice of protest, must state the time, manner, and circumstances under which the notice was given, that the court may judge of its sufficiency. He is not to take upon himself to decide upon such sufficiency. by simply declaring that he gave a legal and timely notice. La. 467. 16 La. 237. As to the vague promise to pay mentioned by the witness, admitting that under an allegation of protest and notice evidence of a subsequent promise to pay can be given, such promise is an agreement to pay money which, under art. 2257 of the Civil Code, must be proved by one credible wit-

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ness, and other corroborating circumstances appearing aliunde. The record shows none in this case. 2 Robinson, 304.

It is, therefore, ordered, that the judgment of the District Court confirming the judgment by default rendered in the premises, be reversed and set aside, and it is further ordered, that this case be remanded to the inferior court to be proceeded in according to law; the plaintiffs and appellees paying the costs of this appeal.

JEAN BAPTISTE PLAUCHÉ and others v. FREDERICK ROY.

The maker of a note secured by mortgage when sued by a party subrogated to the rights of the payee, cannot defend himself by alleging that the syndic of the creditors of the payee, by whom the subrogation was made, had no authority to make it. The creditors alone can complain if the syndic acted illegally. The defendant is not called upon to protect their rights.

The delays granted to the debtors of the banks in the city of New Orleans by the third section of the act of 5 February, 1842, reviving the charters of these banks, apply only to the debts due to the banks at the time of the passage of the act. That act contemplated that every debtor desiring to obtain the extension of time for which it provides, should make a direct application to the board of directors of the bank to which it was due, stating the security which he proposed to furnish, and that such security, whether real or personal, should be examined and found satisfactory by the board, before allowing the extension.

APPEAL from the District Court of the First District, Buchanan, J.

Denis and Pitot, for the plaintiffs.

Canon and Roselius, for the appellant.

Monphy, J. This action is brought upon a promissory note of the defendant, endorsed by A. Dreux, and secured by mortgage on certain slaves purchased by the drawer at a sale made at the instance of the syndic of Laroque Turgeau's creditors. The petition alleges, that the syndic, having given this note to the Consolidated Association Bank in part payment of a debt of Laroque Turgeau, subrogated the bank to all the rights of the creditors of the insolvent under the aforesaid mortgage; and that, in

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consequence of an agreement and settlement between the bank and the plaintiffs, the latter became the owners of the note, and were subrogated to all the rights of the bank.

The defence set up is, that the syndic of Laroque Turgeau's creditors was not authorized by any order of the court, and could not, without such order, make the transfer of the note and the deed of subrogation to the Consolidated Association; that the president of the board of managers of that bank had no legal authority to transfer said note to the plaintiffs; that, under the law of the 5th of February, 1842, the defendant had acquired the right of availing himself of the benefit of the dead weight, i. e. of obtaining a delay of six, twelve, eighteen and twenty-four months from the maturity of said note, on paying ten per cent on the amount of the same, and the interest on the balance, which he offered to do, both to the bank and to the petitioners, in conformity to said law; that as the bank held his note on the 22d of February, 1842, and the plaintiffs before receiving it were aware of the defendant's rights under the law, they are not in a better situation than the bank, and are bound to allow him the above mentioned delay on the same terms and conditions. a judgment below in favor of the plaintiffs, and the defendant has appealed.

The debt of Laroque Turgeau to the Consolidated Bank appears to have been secured by a special mortgage upon the negroes for whose price the note sued on, with two others of an equal amount, was given by the defendant. As the proceeds of the sale were probably coming to the bank, the syndic turned over the note to that corporation in part payment, and subsequently subrogated it by authentic act to all the rights of the creditors of Laroque Turgeau whom he represented. Whether he had authority to do this or not, is a question with which the defendant has no concern. The creditors of the insolvent alone can complain, and the defendant is not called upon to protect their rights.

In relation to the transfer of the note to the petitioners, it appears, that after the Consolidated Association had gone into liquidation, under the law of the 14th of March, 1842, providing for the liquidation of banks, J. B. Plauché & Co. who were creditors

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of that institution by reason of deposits previously made, agreed to receive the defendant's note in payment, and that the transfer was accordingly made to them by the president of the board of managers, under a resolution of the board bearing date the 22d of June, 1842, giving to him and a committee appointed to that effect, full power to take all necessary steps to diminish the cash liabilities of the bank. This resolution clearly authorized the transfer of the note, as one of the means of reducing the cash liabilities of the institution. The course pursued was moreover ratified by the bank, which, although it had not endorsed this paper, agreed, on the application of the plaintiffs, to guaranty its payment.

The third section of the law of the 5th of February, 1842. upon which the defendant relies, declares: "That it shall be lawful for the respective boards of directors, to consider the whole of the debts due them on the passage of this act as forming part of their 'dead weight;' and it is hereby made the duty of the respective boards of directors, to renew such debts now due, or that may mature hereafter, on the application being made to that effect by the respective parties, on the following conditions: 1st. The payment of ten per cent, exclusive of interest, on the maturity of the debts, and the balance at twelve months, renewable until fully paid, on the payment of fifteen per cent each year on the original amount, provided ample and satisfactory security on real estate be furnished by the applicant. 2d. The payment of ten per cent, exclusive of interest, on the maturity of the debts, and the balance by equal instalments of six, twelve, eighteeen and twenty four months, provided the applicant furnish good and sufficient personal security." &c.

The evidence does not show that the note sued upon was held by the bank at the date of the passage of this act. It is only in relation to debts due to the bank at that time, that its debtors were entitled to claim the delays therein granted; but were it even admitted that this note came into the possession of the bank before the passage of the law, and that it was entitled to the benefit of the dead weight, it is not shown that the defendant took the necessary steps to enjoy this privilege. The law of 1842

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evidently contemplated that every debtor wishing to have the extension of time provided for, should make a direct application to the board, stating the security he proposed to furnish, and that such security, whether real or personal, should be passed upon and found satisfactory by the board, before they allowed the applicant such extension of time. The record shows, that the defendant made no application whatever to the board, but at the maturity of his note, left at the bank a note at one year, with a curtailment of ten per cent, and an amount in the notes of the Consolidated Bank equal to such curtailment, and the interest on How this new note was endorsed, or otherwise sethe balance. cured, does not appear. He was informed by one of the officers of the bank that his note could not be renewed, as it was no longer in the possession of the bank, and some time after he withdrew the money he had deposited. Under this evidence it is difficult to consider the defendant as having complied with the requirements of the law of 1842, so as to entitle him to the dead weight, even had his note been yet held by the bank. He made no application to the board, tendered no security for the extension of time, and offered in renewal a note at one year, instead of one at six months, for the first instalment of the delay of 6, 12, 18 and 24 months, which he avers he was entitled to. In addition to this, he has since withdrawn the money he had deposited as one of the conditions necessary to entitle himself to the benefit of the dead weight, abandoning as it were his rights to it, if he had ever acquired anv.

Judgment affirmed.

Burkett and others v. Layton and others.

JAMES BURKETT and others v. ROBERT LAYTON and others.

The vendor of a slave, cited in warranty by his vendee, against whom a judgment is recovered by a third person for the slave and the value of her services from judicial demand, will be responsible to his vendee for the price of the slave with legal interest from the time of such demand, but not for the value of her services from that time, as ascertained by the judgment against his vendee.

APPEAL from the District Court of the First District, Buchanan, J.

Elwyn and Wharton, for the plaintiffs.

Larue, Preston and Grima, for the appellants.

Garland, J. The petitioner, Burkett, is the survivor of two trustees named in the marriage contract made between Charles Levistone and Melanie De Mestre, his wife, in which certain settlements were made on her, and provision made for the trustees holding property for her separate use. The contract is shown to have been made in the State of Georgia, and according to the laws of that State. Levistone and his wife are also parties to the suit, and, with the aforesaid trustees, claim a slave named Diana, in the possession of defendants. They cited Madame Lalaurie, their vendor, in warranty, and she cited Hardy, her vendor, who appeared and prayed that his vendor might be cited, but it does not appear that he ever was, or that he appeared. The defendants deny that the plaintiffs have any right or claim to the slave, and plead prescription.

The evidence shows, that the slave was purchased in 1829, in the city of Savannah, by Thomasson, one of the trustees, for the use of Mrs. Levistone. Her possession for several years is proved, and the slave is identified by a witness who knew her well in Savannah, and has seen her in possession of the defendants. On the part of the latter it is shown, that this slave was sold in New Orleans, in the year 1832, to Hardy, but in what way his vendor divested the plaintiffs of their title is not satisfactorily shown. There was a judgment in favor of the plaintiffs, decreeing that the defendants Layton & Co. should deliver up the slave, and pay the plaintiffs hire for her, at the rate of \$15 per month, from the 18th day of December, 1837, until so delivered and costs-

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These defendants had a judgment against Madame Lalaurie for the sum of \$1000, the price they paid her for said slave, and for hire at the aforesaid rate from the same date; and she, in turn, had a judgment against Hardy for \$400, the price she paid, and for hire at the said rate. From this judgment the defendants Layton & Co. and Madame Lalaurie have appealed.

The case has been submitted without argument or points filed. We have examined the record and find no error as between the plaintiffs and Layton & Co.; but as between them and Madame Lalaurie, we think there is error. She is condemned to pay hire for the slave since her vendors have been cited, whilst they have all the time had the use and possession of the slave, who is proved to be a valuable one. This is wrong, and must be corrected. She is only liable for the price she received and interest; the defendants Layton & Co. having, it is to be presumed, been benefitted by the use of the slave to the extent of her hire.

As the judgment of Madame Lalaurie against Hardy has not been appealed from, we cannot correct it directly; but it is so clearly unjust that she should recover of him hire for the slave when she does not have to pay it herself, that we will attach a condition to the relief we propose to extend to her. In seeking equity she ought to do it herself. If we do not impose some restriction on Madame Lalaurie, she would receive hire for a slave she had sold and received money for, and had the use of during the whole time.

It is, therefore, ordered and decreed, that the judgment as between the plaintiffs and the defendants Layton & Co. be affirmed, but as between the latter and Delphine McCarty, (Madame Lalaurie,) it is ordered and decreed, that said judgment be annulled and reversed; and this court, proceeding to give such judgment as in its opinion ought to have been given by the court below, orders and decrees, that the said Layton & Co. recover of the aforesaid Delphine McCarty (Madame Lalaurie,) the sum of one thousand dollars, with interest thereon at the rate of five per cent per annum from the 18th day of December in the year 1837, until paid, and costs in the court below; it being well understood that this relief is granted to said Madame Lalaurie, upon the express condition that she shall not take or receive on her judgment

against Joseph Hardy, f. m. c., her warrantor, more than the sum of four hundred dollars, with interest at five per cent *per annum*, from the 18th day of December in the year 1837, until paid, and the costs in the court below. The costs of this appeal to be paid by the appellants Layton & Co.

HENRY ETTING v. THE COMMERCIAL BANK OF NEW OR-LEANS.

7r 459 113 812 7r 459

Where a depositary of money to be drawn upon checks or orders pays a forged check, he will be liable for the amount with legal interest from judicial demand. As a general principle, corporations are responsible for the acts of their agents; but they are not liable for every act of the persons in their employment. Where an agent acting in the capacity bestowed on him by a corporation, under the directions of his employers, or in the discharge of some duty incidental to his situation, does any act which causes damage to another, the corporation will be responsible; aliter where an act is done by him of his own free will, without reference to his functions as an agent. Thus a bank cannot be made liable in damages for an unathorized declaration made by one of its officers, that plaintiff had frequently overdrawn his account. C. C. 430, 431, 433, 434.

APPEAL from the Parish Court of New Orleans, Maurian, J. Peyton and I. W. Smith, for the plaintiff.

F. B. Conrad, for the appellants. The judgment must be reversed. The damages allowed are preposterous. Malice and want of probable cause are essential to a recovery on such a claim as that set up by plaintiff. See 2 Starkie, 862, 867, 863. 3 Washington, 36. 9 East, 361. 5 La. 319. Should it be considered that the checks were forged, the claim of the depositor for damages is limited to legal interest on the amount of the checks from judicial demand. Civ. Code, art. 1929.

Maybin, on the same side.

GARLAND, J. The plaintiff alleges, that he is a purser in the navy of the United States, and that, in that capacity and as an individual, he had deposited large sums of money with the defendants; and that the payment of his checks was refused when presented, although he had a sufficiency of funds in the bank to pay them, in consequence whereof they were improperly protes-

ted, and he obliged, at great cost and with damages, to take them up. He claims the sum of \$1663 85, as a balance lying in the bank which is improperly withheld, with interest; the sum of \$38 77, paid for costs of protests and damages; and the sum of \$5000, for damages arising from a slanderous and libellous charge made through the cashier and other officers of the bank, that he (petitioner) "had frequently overdrawn his account as purser with said bank." He avers, that these slanders were circulated verbally and in writing with an "ill intent," and for the purpose of injuring him in his private and professional capacity; wherefore he claims the sums above stated, with interest and costs.

The defendants, after a general denial, state that it is true, the plaintiff did open an account as a depositor, and deposit various sums of money as purser, and that the Bank, during the period said account was kept, always paid the plaintiff's checks punctually; but that finally the plaintiff overdrew his account as purser, which over-drafts have since been covered and made good by new deposits. It is further stated, that in consequence of such recent deposits there is a credit of \$303 98 in favor of plaintiff, which is ready to be paid to him. The respondents further deny that with "an ill intent" any slanderous or libellous charges were ever made.

It is apparent from the testimony, and is not denied, that the plaintiff, as purser, deposited at different times in the Bank, the sum of \$11,509; and he admits that he drew checks to the amount of \$9845 15, which were paid. The defendants produce checks which were paid to the amount of \$11,205 02, and from this discrepancy the difficulty arises. Four of the checks produced and paid, amounting to \$1359 87, the plaintiff asserts are forgeries. The defendants contend that they are genuine, and upon this question the whole case turns. It is proved, that the plaintiff held the station in the navy which he states in his petition. His station was at the navy yard near Pensacola. Soon after his arrival there, and without its being shown that he was personally acquainted with a single director or officer of the Commercial Bank, he made a deposit of \$9859, and commenced checking on it; using the checks principally to pay the officers and persons connected with the navy yard, and in the public

service, but sometimes giving them to other persons. checks, it is shown, circulated freely at and in the neighborhood of Pensacola, at a premium ranging from eight to fifteen per cent. The plaintiff, in addition to the duties of his public station, had a mercantile establishment near the navy yard, commonly called the "Purser's Store," and to facilitate his operations and promote the convenience of the people of the vicinage, had issued a number of small notes or bills, which circulated as currency at the time. The business was carried on without difficulty for a considerable time, and the plaintiff's checks were regularly paid until about the 3d of July, 1838, when the cashier of the Bank wrote to the plaintiff and informed him, that his account as purser was overdrawn to a small amount, and that numerous checks were almost daily presented and payment refused. lar attention of plaintiff was called to this matter; and after some correspondence, and a call on his part for a list of checks, with dates, numbers, names of payees, and amount of checks, &c., the plaintiff informed the defendants that four checks, amounting to the before mentioned sum, were forged. He had previously asserted the correctness of his account, and also made other deposits to meet outstanding checks and cover the reported deficiency, which it is shown was inconvenient; and the return of a number of checks, some protested and others not, caused serious inconvenience and annoyance, some expense for protests, and the payment of damages occasionally, and injury to the plaintiff's credit and standing as a business man. The small notes or bills in circulation, suddenly and rapidly came back on the plaintiff, and were taken up by him in August or September, at considerable inconvenience.

The evidence in relation to the four checks alleged to be forged, we have carefully examined. It is contradictory in its character, but we have had the benefit of an inspection of the checks alleged to be false, and have compared them with those admitted to be genuine, and, after weighing all the testimony, we concur in opinion with the Judge and jury below, that these checks are not genuine; yet they are so well executed, as easily to deceive a close and accurate observer; and we see nothing to justify a belief, that the officers of the Bank were not in good faith when

they paid them. The testimony is voluminous and minute, and cannot be much condensed: but we have no doubt, after weighing it, as to the correctness of our inferences from, and conclusions upon it. The checks are not printed forms such as are generally used, but are all written; and the four in controversy purport to be all in the hand-writing of the plaintiff, which has enabled us to make a more accurate comparison, and to discover differences in the writing, which would have been difficult if only a few words had been written. Besides the differences that are perceptible upon a close examination of the writing, another fact is conclusive. It is proved that the plaintiff kept a check book, and all the genuine checks are written on paper taken from it and are alike, while the forged checks are written on paper of a different quality. This fact is proved by a paper dealer and manufacturer, who describes the difference in the quality of the paper; yet the imitation of the plaintiff's writing and signature is so close, that several bank tellers and clerks testified that they would have paid the checks, unless there had been some circumstance to cause unusual caution and particular investigation.

The evidence as to costs and damages is quite indefinite; and although it is proved that something was paid, no specific amount is established.

In support of the claim for damages, in addition to what has been stated, it is shown that the cashier wrote to the plaintiff that his account was overdrawn; and he swore on the trial that he believed it was at the time, and, taking the four checks disputed into account, the statement was true. To a person who presented a check drawn by the plaintiff, the cashier, or some other officer, after refusing to pay it, said that the plaintiff had overdrawn his account, and did so frequently. This was reported to the plaintiff, who was much mortified thereby, and annoyed by his checks not being paid; and the circumstance caused much speculation and remark among the officers and other persons at the navy yard, and in Pensacola.

After a long investigation, the jury gave a verdict for the whole amount claimed in the petition. The Judge refused to grant a new trial; and from the judgment given against the Bank, this appeal has been prosecuted.

Etting v. The Commercial Bank of New Orleans.

In this court the case has been argued at great length, and many points presented which we do not think it necessary to decide.

As to the sum of \$1663 85, we have no doubt of the right of the plaintiff to recover it. The officers of the Bank were imposed on, and paid four checks which the evidence satisfies us were not drawn by the plaintiff. The Bank must, according to the well established decisions of this court, and the principles which govern the contract of deposit of money to be drawn upon checks or orders, bear the loss. The depositary must take care that he pays none but the checks or drafts of the depositor. See Laborde v. The Consolidated Association of Louisiana, 4 Robinson, 190.

There is not, in our opinion, sufficient evidence to support the claim of \$38 77, for costs of protests and damages paid on the returned checks. The plaintiff paid something, but what sum is not definitely proved; and his counsel, during the argument, in effect admitted the insufficiency of the evidence, and said he was willing to enter a remission for the amount, if the judgment should, in other respects, be confirmed.

The claim for damages is based, as the counsel informs us, upon article 2294 of the Civil Code, and the decision of this court in 16 La. 395. It is in effect a demand to make a corporation liable in damages, for a slander alleged to have been uttered and propagated by one or more of its officers or agents, against a person doing business with the institution. This is, in our opinion, pushing to a rather unreasonable extent the principle, that every act of man that causes damage to another, obliges him by whose fault it happens, to repair it. To support the position assumed, the counsel have quoted the decisions of this court in 5 La. 67, 463, and 1 Robinson, 178, in which it was held that corporations are responsible for the acts of their agents; and to that, as a general principle, we now adhere; but it does not prove that they are responsible for every act of the persons in their employ, and a standing security for all they may say or do. court, in the cases cited, and others that might be, if necessary, have gone quite as far as any other tribunal, in holding corporations to a just responsibility both for their own acts and those

of their agents; but we think we are now requested to go a step beyond any decision heretofore given. The cases cited from 4 Serg. & Rawle, 17, 19; 19 Pickering, 515; 4 Ohio Rep. 513; 1 Wilcox' Ohio Rep. 160, and 2 Harrington, all rest upon the same principles as those assumed by this court in 5 La. and 1 Robinson. In 15 La. 169, 17 Mass. Rep. 500, and 1 Hill's Rep. 578, will be found cases in which corporations have been exempted from liability for the acts of their agents or employes. The true rule seems to be, that when the agent acting in the capacity bestowed upon him by the corporation, and in discharge of some duty or employment directed by the employer or incidental to his situation, does an act that causes damage to an individual, the body corporate is responsible; but where the agent does any act of his own free will, without reference to his functions as a corporate agent, then the corporation is not responsible. For example, if a person should go into a banking house or an insurance office, and there get into a difficulty, or dispute in relation to business of the corporation, with an agent or officer, and an assault and battery should ensue, we suppose it would not be seriously contended that the bank or office was answerable in damages, unless there was some express recognition of the act. Articles 430, 431, 433, 434 of the Code, prove this position to be cor-We suppose a bank could not maintain an action for damages against an individual, if he were to say that it was insolvent, or had issued more notes than it was authorized by its charter. If this be so, it would be unjust to make it responsible for an unauthorized accusation made by one of its officers against another person.

But the strongest objection to a recovery in this case, is the entire absence of any malicious or evil intent, on the part of the officer of the Bank alleged to have uttered the slander charged. It is not distinctly shown, whether it was the cashier or some other officer, who told Gosling that the plaintiff had over-drawn his account; but it is shown, that he (plaintiff) was an entire stranger to the persons managing the business of the Bank, that he sent the amounts deposited from Pensacola, and was never in the banking-house until long after the difficulties complained of occurred. We cannot discover any motive on the part of the Bank or

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its officers to injure the plaintiff. His checks were paid, as long as there was money to pay them; and when it was gone, there was no alternative but to say so. The Bank was imposed on by a fraud, which the plaintiff himself says, was perpetrated by a person in his own employment; and it would appear to be very nearly as just to make him responsible for his unauthorized acts, as to make the Bank answer for the unauthorized acts of its officer. After the most deliberate reflection, we are of opinion, that the plaintiff has no cause of action or right to recover damages from the defendants.

The view we have taken of the case, makes it unnecessary to decide upon any of the bills of exceptions taken by the parties, as we have based our judgment as to the four checks being forged, upon testimony not objected to by either.

It is, therefore, ordered and decreed, that the judgment of the Parish Court be annulled and reversed; and that the plaintiff do recover of the Commercial Bank of New Orleans, the sum of one thousand six hundred and sixty-three dollars and eighty-five cents, with interest thereon, at the rate of five per cent per annum from judicial demand until paid, with costs in the court below; those of the appeal, to be paid by the plaintiff.

JAMES DICK and others v. CHARLES BYRNE and another.

Compensation does not take place, by operation of law, between a debt due by a commercial partnership and one due to one of its members individually; and where the debt by the partnership has been transferred to a third person and notice given to the debtors, the latter cannot plead the amount of the debt due to the individual partner in compensation, even by way of exception.

In an action against a partnership for a debt, defendants may compensate by way of exception, a debt due by plaintiff to a member of the partnership individually.

APPEAL from the Commercial Court of New Orleans, Watts, J. L. Peirce, for the appellants, contended, that the debt due by plaintiffs had been extinguished by compensation, citing 7 Toullier, book 3, tit. 3, No. 377. Domat, part 1, book 3, tit. 3, § 1, No. 8. Pothier, Oblig. Nos. 27, 28.

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Bradford, for the plaintiffs. Compensation takes place by operation of law only where "two persons are indebted to each other." Civ. Code, art. 2203. The debtor in one case must be the same person as the creditor in the other. Plaintiffs are not in the situation of debtors, in solido. A commercial firm is a species of artificial being, possessing, in contemplation of law, a separate existence independent of the individuals who compose it. A debt due by a partnership is consequently not compensated by a debt due to any partner individually. The debtor in the one case is not the same person as the creditor in the other. Such is the doctrine of Toullier. See Vol. 7, s. 378. This doctrine has been sanctioned by a decision of this court, in the case of Blanchard v. Cole et al., 8 La. 153-162.

Bullard, J. The present case discloses the following state of facts: McLean, one of the partners of Dick, McLean & Hill, had a judgment against Charles Byrne, for about two thousand dollars. The firm had, at the same time, in the warehouse of Byrne, a lot of cordage on store, upon which there was due by them, on the 7th June, 1842, \$313 26 for storage. On that day Byrne transferred and assigned the account to Joseph Landis, and Dick, McLean & Hill, were notified of the assignment. Thereupon, they brought the present action in which they claim that the rope shall be delivered to them, alleging that the claim for storage had been extinguished by compensation by the effect of the judgment rendered in favor of one of the partners, which was thereby extinguished, pro tanto. The defendant Landis, claimed the amount of the storage in reconvention; and judgment having been rendered in his favor, the plaintiffs appealed.

The case, therefore, presents this question, whether a commercial firm can oppose in compensation of a debt due by the firm a debt due to one of the partners; or rather, whether such compensation takes place by operation of law.

The general rule according to the Civil Code is, that the debtor, in solido, cannot oppose the compensation of what the creditor owes to his co-dettor. Art. 2208.

But if the co-debtor assents to the compensation, we see no objection to the doctrine of Pothier, that it may be allowed by way of exception. Oblig. part 2, No. 594.

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It is, however, contended, that the compensation took effect by operation of law, to the extent of McLean's share of the debt due to Byrne at least; and to that effect the counsel cited Pothier on Obligations, No. 274, Domat, and 6 Toullier, 733.

This position is sustained as it relates to ordinary co-debtors, in solido, by the authorities cited by the counsel; and also by Duranton, vol. 3, Des Contrats et Donat. No. 948. But in relation to partnership debts, this court has adopted the doctrine of Toullier, as more consonant to the positive enactment of the Code. That author treats a commercial partnership as an artificial being, distinct from the persons of which it is composed.

"Les créances de la société ne peuvent donc etre compensées avec les dettes de chaque associé, lorsque ces dettes n'ont point été contractées pour le compte de la société, mais pour son compte particulier, et vice versa. 7 Toullier, 378.

This is the view of the question which the court took in the case of Blanchard v. Cole et al. 8 La. 153, 160.

In the case now before the court, if Byrne had sued the firm, for the storage, the latter might, with the consent of McLean, have availed themselves of compensation by way of exception, but that compensation did not take place by operation of law; and after the transfer of the debt to Landis, and notice to the firm, the compensation cannot avail the defendants.

See also, Smith v. Duncan & Jackson, 1 Mart. 25, and Thomas v. Elkins, 4 Mart. 378.

Judgment affirmed.

AUGUSTIN MACARTY v. LEONAND P. BUREAU.

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After a dilatory exception had been overruled, defendant filed a paper in these words: "To the judge, &c.; the answer of, &c. says that the action of plaintiff is prescribed, and respondent prays that the petition be dismissed, with costs."

Held, that this must be considered as an answer to the merits; that though prescription may be set up as an exception, it may also be pleaded as an answer, and that the answer not denying the allegations of the petition, they were properly considered as admitted, and judgment correctly rendered for the plaintiff without further evidence.

Pleas of the general issue and prescription are not inconsistent.

Macarty v. Bureau.

APPEAL from the Parish Court of New Orleans, Maurian, J. Blache, for the plaintiff.

Josephs, for the appellant. There was no answer to the merits. The plea of prescription is a peremptory exception. Code of Pract. art. 345. The Judge should have required proof of plaintiff's claim. The plea of prescription does not, like that of payment, admit the existence of the debt. No presumption as to the merits can be drawn from such a plea. Civ. Code, arts. 2126, et seq. 3494, 3496, 3515.

Ductos, on the same side.

Morphy, J. The defendant being sued for four months rent of a store, ending on the 30th of April, 1842, at the rate of \$100 per month, interposed a frivolous exception, which being overruled, he filed a paper purporting to be an answer to the plaintiff's petition, in which, without denying the facts therein alleged, he pleads prescription. This plea being clearly inapplicable, as this suit was begun a few days after the last month had become due, and the plaintiff's allegations not being denied, there was a judgment below against the defendant, from which he has appealed.

It is argued by his counsel, that the plea of prescription, being a peremptory exception founded on law, was erroneously decided by the Judge to be an answer to the merits; and that he erred also in not requiring the plaintiff to prove his demand, on the ground, that the plea of prescription, like that of payment, is an admission of the existence of the debt.

The Judge did not err, we think, in deciding that the paper filed by the defendant, after his dilatory exception had been overruled, was what it purported and was intended to be, an answer

^{*} The paper filed was in these words :

[&]quot;To the Hon. the Parish Court in and for the Parish and City of New Orleans, State of Louisiana: The answer of Leonard P. Bureau, of the City of New Orleans, to the petition of Augustin Macarty, says, that the action brought by said plaintiff is prescribed by law; and respondent prays that plaintiff's petition may be dismissed, with costs.

J. Marcel Ducros, Attorney for defendant."

The dilatory exception previously filed and overruled was also styled by the atorney: "The answer of Leonard P. Bureau, &c. to the petition, &c."

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on the merits. It was so called and treated by the defendant; and the suit was placed on the ordinary docket, where it was reached and tried only seven months after. Prescription might have been set up as an exception; but in this case it was pleaded as, and in the form of an answer to the plaintiff's petition. We are of opinion that the plea of the general issue and that of prescription, are not inconsistent with each other. Had the defendant denied the facts set forth in the petition, the plea of prescription would not have waived the general issue, so as to relieve plaintiff from the necessity of proving his demand. 7 La. 85. But in this case the answer contains no such denial. proof was therefore necessary, and the Judge properly considered the facts as admitted. But the counsel contends, that as the plaintiff thought proper to introduce a witness, his testimony, which cannot be divided, shows, that the defendant owes only \$300. This witness stated, that he presented the account for the rent to Bureau, who answered that he had no money for the amount; that he would give security to the plaintiff, for the payment of \$300; and that, as to the last month, he was not to pay it, as he had delivered the keys of the store to some one whom he did not name, &c. This testimony does not prove that the defendant owes no more than \$300, but only that he expressed the opinion, on some ground not distinctly stated, that he did not owe the last month of his rent. It leaves in full force the admission resulting from his failure to deny the facts alleged in the petition, which show his liability for the whole amount claimed.

Judgment affirmed.

Hivert v. Lacaze.

ALEXANDER HIVERT v. ELIZABETH ROSE JEAN PIERRE FIR-

Where a judgment rendered below is affirmed on appeal, but the case remanded for the purpose of ascertaining the amount of expenses and damages due to the plaintiff for the reimbursement of jail fees, and other charges incurred in taking care of the property in dispute pending the suit, the amount of which had not been liquidated, though the right of the plaintiff to recover them had been recognized in the judgment of the lower court, the surety on the appeal bond will not be discharged. There is no change in the judgment appealed from. C. P. 579.

APPEAL from the District Court of the First District, Buchanan, J.

Bodin, for the plaintiff. ,

Pepin, for the appellant.

Morphy, J. P. A. Charbonnet has appealed from a judgment rendered against him, as surety of the defendant on an appeal bond. The only defence offered to the rule below was, that the decree of this court having amended the judgment of the District Court, the appeal bond became null and void, in as much as it could have force and effect only in case of an affirmance of the judgment appealed from. The appellee has answered this objection by referring to art. 579 of the Code of Practice, which provides that, "In the appeal bond it must be set forth, in substance, that it is given as surety that the appellant shall prosecute his appeal, and that he shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real and personal, if he be cast in the appeal; otherwise, that the surety shall be liable in his place." Whether under this, and the other provisions of the Code of Practice on the subject, it be true that no recovery can be had on an appeal bond, in case there is a change, however slight, in the judgment appealed from, it is unnecessary to decide in this case, as on turning to the decision we find, that the judgment of the District Court was actually affirmed with costs. 3 Robinson, 357. It is true, that the case was remanded to the lower court; but this was done only for the purpose of assessing the amount of expenses and damages due to the plaintiff. The judgment of the District Court had recognized his right to obtain the reimbursement of jail fees, and other charges, incurred for the keeping

and taking care of the slave during the pendency of the suit, but without liquidating the same. So far as the judgment was certain and susceptible of being executed, it was absolutely affirmed by this court; but instead of reserving plaintiff's right to claim his expenses and damages in a separate action, which might have been done, it was thought best to remand the case that they might be assessed in the present suit. We do not consider this as a change in the judgment appealed from. It was affirmed as given, and will be executed in the same manner as if no appeal had been taken.

Judgment affirmed.

JOHN R. MARSHALL v. WELLIAM M. LAMBETH and others.

Partnership in commendam is not considered by the Civil Code as a distinct species of partnership, but rather as an incident or accessory which may be attached to and incorporated with all kinds of partnerships. The partner in commendam is viewed as a partner only to a certain extent. ©. C. 2799, 2810, 2811, 2815.

The liability of a partner in commendam closes with the expiration of the partnership, when he may withdraw the funds contributed by him and his share of the profits, subject only to the debts created during its existence. C. C. 2812, 2847. And where the partnership was formed for a limited period, and the contract recorded in the office of the Recorder of Mortgages, no other notice of the dissolution is necessary.

On the dissolution of a partnership in commendam, the acting partners have a right, in the liquidation of the partnership, to continue to use the social name. The partner in commendam cannot prevent their doing so; nor can the knowledge of the latter that the acting partners continued to use it, subject him to any liability. The presumption upon which liability may be fastened on an ordinary retiring partner who suffers his name to remain as part of the firm, that the partnership was trusted upon his responsibility, does not apply to a partner in commendam, whose name cannot appear in that of the partnership, and whose liability, as to amount and duration, is determined by, and may be ascertained from the registry of the contract which the law requires to be made. So long as he does none of those acts which by law impose on him the liabilities of a common partner, no one has a right to look beyond such registry. C. C. 2819, 2820.

APPEAL from the Commercial Court of New Orleans, Watts, J. The petition alleges, that William M. Lambeth, William E. Thompson and Charles A. Jacobs, late commercial partners trading

under the firm of W. M. Lambeth & Thompson, are indebted to the petitioner as endorsee before maturity, of a bill of exchange drawn upon the firm of W. M. Lambeth & Thompson, which was accepted by them and duly protested for non-payment. The plaintiff prays for a judgment against the defendants, in solido. The bill is alleged to have been dated on the 26th April, 1841, and to have been payable nineteen months after date, on the 29th November, 1842.

Jacobs filed a separate answer, pleading a general denial, and specially denying that he was, at the time of the acceptance of the bill sued on, or at any time, a commercial partner in the house of W. M. Lambeth & Thompson, or in any manner liable for said acceptance.

There was a judgment against Lambeth and Thompson, from which no appeal was taken. From a judgment in favor of Jacobs the plaintiff has appealed. The facts of the case are set forth in the opinion delivered by Morphy, J.

By a notarial act offered in evidence by the plaintiff, executed on the 16th of June, 1840, it appears, that the partnership in commendam was dissolved by consent, to take effect from the 1st of March preceding; that Jacobs, in consideration of the sum of \$205,000, to be paid as specified in the act, conveyed to Lambeth & Thompson all his interest in the partnership, including the capital advanced by him and the profits to which he was enti-This act contains the following provision: "And the said William M. Lambeth and William E. Thompson have declared, that they do hereby bind themselves to take charge of the liquidation of the business and concerns of the said partnership in commendam under the style of William M. Lambeth & Thompson, and to pay all the debts of whatsoever nature or kind of the said firm, hereby further binding themselves to save the said Charles A. Jacobs harmless from any claim or claims whatsoever which may in any wise be made against the said firm for and by reason of any debt or debts of the said firm; and further promising, that the said Charles A. Jacobs shall never be troubled. nor in any manner called upon for the payment of said debts, or any part thereof."

Dunbar, for the appellant. Partnership in commendam is but

a modification of the different kinds of partnership. Civ. Code, arts. 2810 to 2822. A commercial partner in commendam is bound, as a general commercial partner, except so far as he is protected by the provisions of the Code. The only difference in his favor is, that he is not bound beyond the sum contributed by him. Wherever it can be shown that a general partner would be responsible, a partner in commendam will be liable to the extent of the capital contributed by him. Though the power to use the social name after the dissolution be considered to have extended only to the liquidation of the business of W. M. Lambeth & Thompson, yet if Lambeth and Thompson exceeded the powers conferred, Jacobs must be held responsible, unless it be shown, which has not been done, that plaintiff was aware that the powers had been thus exceeded. It is immaterial that Jacobs' name does not appear in the acceptance, the social name being used. Story on Partnership, 158-159. The Civil Code does not prescribe what shall make a partner in commendam liable after dissolution—his liability growing out of subsequent matters must be regulated by the general commercial law.

Grymes, for the defendant Jacobs. The liability of the partner in commendam terminated when the partnership ceased to exist, and the fund furnished by him was released from all liability except for debts and obligations created during the partnership. The obligation sued on is dated ten months after the expiration of the partnership. After the defendant Jacobs had ceased to be a partner in commendam, he had no control over the general partners as to the social name they might use, and cannot, consequently, be liable for their use of any name. His retirement did not, per se, dissolve the general partnership existing between the other partners, who had a right to continue it under the social name. He never formed an integral part of the partnership.

W. M. Randolph, on the same side. No notice was necessary to relieve Jacobs from liability after the expiration of the partnership in commendam. No one dealt with the partnership on his responsibility but those who had seen the articles of partnership, which limited its duration. The recording of them was itself notice of the time at which the partnership would expire. Civ. Code, art. 2819. A partner in commendam is like a dormant Vol. VII.

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partner, for whose protection against transactions subsequent to the dissolution of the firm, no notice of dissolution is necessary. Collyer on Part. 313, and note. 5 Cowen, 534.

Morphy, J. On the 4th of August, 1838, Wm. M. Lambeth and Wm. E. Thompson formed a commercial co-partnership with Charles A. Jacobs, under the style of W. M. Lambeth & Thompson; the former to be the acting and general partners. and the latter a partner in commendam to the extent of \$150,000, which he paid. The partnership, which was to last for three years from the 1st of August, 1837, was duly recorded in the office of the Recorder of Mortgages. On the 16th of June, 1840. shortly before the partnership was to expire by its own limitation, it was dissolved by mutual consent. The partner in commendam withdrew from it, conveying and setting over to Wm. M. Lambeth and Wm. E. Thompson, all his rights, claims and interest in the concern, for the sum of \$205,000. They assumed all the debts, and undertook to liquidate the affairs of the partnernership, and to save Charles A. Jacobs harmless from all claims whatsoever that might be made against the firm. Public notice of the dissolution of the partnership was given in August, 1840, when Lambeth and Thompson announced that, having purchased the entire interest of their partner in commendam, they would in future conduct the business for their sole account. This notice was signed W. M. Lambeth & Thompson. Under this firm they continued to do business, and made no change in their books or mode of carrying on their affairs, until July, 1841, when they took in other partners, and altered the name of their firm to that of Lambeth, Thompson & Co. During the period of the partnership in commendam, and ever since, Charles A. Jacobs has had an office in the same building with Lambeth and Thompson, and a sign on the outer door of the house.

Some time after the expiration of the partnership in commendam, to wit, on the 26th of April, 1841, W. M. Lambeth & Thompson, in consideration of an assignment made to them of two judgments obtained against some of their customers, accepted two drafts of the latter. It is on one of these acceptances that the present suit has been brought, and that Charles A. Jacobs is

sought to be made liable. There was a judgment below in his favor, and the plaintiff has appealed.

Charles A. Jacobs being shown to have been only a partner in commendam of the firm of W. M. Lambeth & Thompson, it is by no means clear that its creditors have against him the same right of action which they can exercise against the firm. partnership in commendam is not considered by our Code as a separate and distinct species of partnership, but rather as an incident or accessory, which may be attached to and incorporated with all kinds of partnerships, and the partner in commendam is viewed as a partner only to a certain extent. Civ. Code, arts. 2799, 2810, 2811, 2815. In the country from whose jurisprudence we have borrowed this kind of contract, the partner in commendam is considered in the light of a simple furnisher of funds, (bailleur de fonds,) liable only to the partnership to which he binds himself to pay the same, and it has been a question of much discussion and doubt, whether the creditors of the firm have against him a direct action in their own name. The better opinion seems now to be, that the creditors have no such action, although they can compel the partner in commendam to pay the amount he has agreed to put into the partnership, by exercising against him the rights of the acting partners. Rogron's Comments on art. 23 of the Code de Commerce. Pothier, de la Société, No. 202. Pandectes Franc. v. 19, p. 146. Delangle, Comment sur les Sociétés Commerciales, Nos. 267 to 293. Admitting that it is otherwise under the articles of the Civil Code of this State, it is not easy to perceive how Charles A. Jacobs can be made liable as a partner in commendam of the firm of W. M. Lambeth & Thompson, on an acceptance given by the latter ten months after the dissolution of the partnership in commendam. of which public notice was given in the newspapers. This notice was not even necessary, perhaps, to relieve Jacobs from future liability; as all persons who had dealt with the firm upon his responsibility, knew, or ought to have known, from the recorded contract which informed them that he was a partner in commendam, that his connection with the firm was to last only three years from the 1st of August, 1837. With the expiration of the partnership his liability ceased, and he had the right to with-

draw the funds he had put in it and his share of the profits, subject only to the debts created during its existence. Civ. Code, arts, 2812, 2847. The petition charges Jacobs as a general part. ner of the firm of W. M. Lambeth & Thompson, without alleging that during the partnership, or since, he has done or omitted any act, the commission or omission of which should impose upon him the liabilities of a common partner. But our attention has been called to a clause in the act of dissolution of the 16th of June, 1840, which the counsel for the appellant construes into a permission or consent given by Jacobs, that his partners should use the social name of the partnership in commendam, in the liquidation of its affairs. He contends, that by giving his consent, and afterwards suffering Lambeth and Thompson to use the social name for their own affairs, he has made himself responsible for the acceptance sued upon; and various authorities have been referred to, showing that if a partner withdraws from a partnership, and yet suffers his name to continue and stand as a part of the firm, he will be held liable notwithstanding his retirement. We cannot give to the clause relied upon the meaning attached to it by the counsel. It appears to us, to be nothing more than a stipulation on the part of William M. Lambeth and William E. Thompson, to undertake the liquidation of the partnership affairs and to save Jacobs harmless from all claims against the concern. They had an undoubted right, without his consent, to carry on such liquidation under the name of W. M. Lambeth & Thompson, which was their firm, as the general and acting partners and not that of the partner in commendam, in whose name the business could not be carried on. Civ. Code, arts. 2810, 2820. Jacobs could not prevent Lambeth and Thompson from continuing to use that firm as long as they pleased, as his admission into the partnership on the footing of a partner in commendam never made him an integral part of the firm; but even if the continued use of the social name could have authorized any one to believe that there had been a continuance of the partnership with Jacobs, this belief must have been completely destroyed by the public notice given in August, 1840, that Lambeth and Thompson would continue to do business for their sole account, under the firm of W. M. Lambeth & Thompson. How then can it be pretended, that



the plaintiff dealt with the firm upon the responsibility of Charles A. Jacobs? The ground upon which, in other partnerships, liability may be fastened on a retiring partner, who suffers his . name to stand as a part of the firm, is the supposition that the firm was trusted upon his responsibility; but this reason cannot apply to a partner in commendam, whose name cannot appear in the firm adopted by the acting partners, and whose liability, as to its extent and duration, is determined by, and can be ascertained from the registry which the law requires to be made. long as the partner in commendam does none of those acts which by law impose upon him the liabilities of a common partner, no one has a right to look beyond such registry. Civ. Code, arts. 2819, 2820. No liability can be based on Jacobs' knowledge that the social name continued to be used by Lambeth and Thompson. He had not the means of preventing them from using it, and he had a right to expect, that every person dealing with them upon his responsibility as a partner in commendam, would consult the records of the Recorder of Mortgages, and would be informed that his connection with that firm had ceased since August, 1840. We can attach no importance whatever to the circumstance of Jacobs having had an office in the same building in which his former partners kept their counting-room, and a sign upon the same door. It is not pretended that since the dissolution of the partnership in commendam, Charles A. Jacobs has in any way or shape participated in the profits of the business of W. M. Lambeth & Thompson. We can perceive, then, no ground whatever upon which he can be held liable to the plaintiffs.

Judgment affirmed.

Succession of Antoine Peytavin—Marie Anne Louise | Bonnefox and others, Appellants.

The third section of the stat. of 13 March, 1837, which makes it the duty of executors, &c. "to deposit all moneys collected by them, as soon as the same shall come into their hands, in one of the chartered banks of this State, or in one of their branches, allowing interest on deposits, if there be one in the parish, &c., and on no account to remove said deposit or any part thereof, until a tableau of





distribution is homologated, or unless ordered by a competent court, &c..." under the penalty of being condemned to pay for the use of the estate twenty per cent per annum interest on the amount not so deposited, or withdrawn without order, besides all special damage, and of dismissal from office, being highly penal, must be rigidly construed. Where there is no bank in the parish in which the executors reside and the succession is under administration, paying interest on deposits, the executors are not bound to deposit the funds, the object of the law being not so much the safety of the funds, as the rendering of them productive.

In proceedings against an executor to render him personally liable for debts due to the succession in consequence of alleged neglect, it is for him to exonerate himself by showing reasonable diligence.

The mere fact of not bringing suit to recover a debt due to the succession is not conclusive proof of want of due diligence on the part of the executor.

APPEAL from the Court of Probates of Ascension, Duffel, J. Connely and Lawes, for the appellants.

Ilsley, Nicholls, A. Duffel and J. Seghers, contra.

Bullard, J. The executors of the last will of Peytavin having paid all the debts due by the succession, one of them filed a tableau, according to which they proposed to distribute the balance of the assets in their hands among the various legatees, the amount of the assets not being sufficient to pay the legacies in full. He charges himself with ten per cent interest on the sums in hand, but with this reservation, that if any attempt should be made to render the executors liable for any of the debts mentioned in the present account, or to render them responsible for any larger amount than that which is admitted to be on hand, to wit, \$10,343 73, then the interest shall be stricken out, or reduced to five per cent.

Various oppositions were made by the legatees and attorney of absent heirs, which it is necessary to notice only so far as they have been insisted on in argument before this court, after having been overruled by the Court of Probates. They relate principally to a considerable amount of outstanding debts, due partly to the former partnership of Reynaud & Peytavin, and partly to the estate of Peytavin alone, which the opponents contend that the executors are liable to account for, because they neglected to make the collection thereof.

It is proper, however, to dispose of the demand of the legatees

against the executors for the penalty of twenty per cent, which they allege has been incurred in consequence of the executors not having deposited the money of the estate received by them, in some bank paying interest on deposits, in accordance with the act of 1837. That statute makes it the duty of executors and other administrators of estates to deposit moneys belonging thereto, "in one of the chartered banks of this State, or in one of their branches, allowing interest on deposits, if there be one in the parish." &c., under the penalty of twenty per cent per annum interest on the amount not so deposited, or withdrawn without order, and dismissal from office. We are clearly of opinion, that the executors were not bound to convey the funds out of the parish where they resided, in order to deposit them in bank; and it is shown there was no bank in the parish which paid interest on The statute is highly penal, and must receive a rigid construction. It does not require the money received by executors to be deposited in bank, unless there be a bank which, by its charter, pays interest on deposits. This is the grammatical construction of that clause of the third section, which makes it the duty of executors and administrators to deposit the funds belonging to estates administered by them. The words, "allowing interest on deposits," must refer to the word "bank" as the antecedent, rather than to the word "branches," because we know of no bank whose branches pay interest on deposits, when the mother bank does not. The object of the Legislature apparently was. not so much the safety of the funds, as to render them productive during the delays which attend the final "winding up" of estates.

The principal questions which the case presents, relate to the diligence used by the executors in collecting a considerable amount of outstanding debts. It is for them to exonerate themselves by showing reasonable diligence. Such is the well-settled doctrine on the subject.

The first item to which our attention is called, for which it is contended the executors are liable, is a sum of \$262 25, set down in the account as a bad debt. It is composed of a number of small sums due by different persons, for moveables purchased at the sale of the property belonging to the succession. It is not

shown in evidence at what time the debtors became incapable of paying, nor why they were not required to give good security, nor what steps have been made to coerce payment.

With respect to the debts owing by Laroque Turgeau and Barthelemy, which were due before the death of the testator, the Parish Judge who tried the cause, was satisfied with the degree of diligence used by the executors. Both became insolvent, and made a surrender to their creditors. The claims of the estate of Peytavin appear upon their tableaux of distribution, and it appears there is yet due a part of the debts, which will probably be realized. When we examine all the evidence exhibited in the record, we are not prepared to say that the court erred in coming to the conclusion, that the executors have not made themselves liable by their neglect.

The largest item contested by the opposing legatees is that of \$14,841, due to the late firm of Reynaud & Peytavin. This sum appears due by numerous individuals who had open accounts with that firm, of which the testator was a partner. were all due long before his death. The whole are set down as bad debts. It is contended that, with respect to a large part of these debts, no attempt is shown to collect them. We do not think that the mere fact of not bringing suit for a debt, is conclusive against the executor. To sue every body indiscriminately, however hopeless the debt, would imprudently involve an estate in costs. In some instances in the case before us, the executors appear to have been advised not to sue, by the attorney of absent heirs. Several witnesses were examined as to the situation of the debtors and their ability to pay, and the Judge concluded. from the whole evidence before him, that it would be unjust to condemn the executors to account for any part of that mass of petty debts, which no diligence on their part could have enabled them to collect. A careful examination of the evidence does not authorize us to say that he erred.

Thus, it appears to us, there is a trifling error of two hundred and sixty-two dollars and twenty five cents, to the prejudice of the legatees. But this is more than made up by a voluntary allowance of interest at ten per cent, instead of five, upon the whole amount in the hands of the executors. This allowance

we have seen, was made on the condition, that the executors should not be held liable for any of the debts mentioned in the account as bad debts. Such a condition, not having been accepted, did not preclude the legatees from making opposition; but we think equity forbids, that the tableau should now be opened for the purpose of charging the executors with the above sum; and as the parties appear to have acted in good faith, the ends of justice will be best attained by affirming the judgment of the Court of Probates, and directing the distribution of the funds on hand, including the arrearages of interest at ten per cent.

Judg ment affirmed.

- SARAH ANN PENNY and Husband v. RICHARD T. CHRIST-MAS, Tutor, and ELIZABETH M. CHRISTMAS, Tutrix of the minor heirs of Malachi Weston.
- A Court of Probates has jurisdiction of an action against minors represented by their tutor, for property in the possession of the latter, where both parties claim under a bequest made by a common ancestor and plaintiff sues for a partition.
- The validity and effect of a will made and carried into execution in another State, and the kind of estate which it confers upon the legatees especially as to personal effects situated in that State, must be tested by the law of the domicil of the testator and not of the legatees.
- In the construction of wills money ordered to be invested in any species of property for the purposes of a bequest, is always regarded as such property. Money to be employed in the purchase of land is treated as land.
- In the construction of wills the intention of the testator is the object to be ascertained, and the language used by him must be understood according to its ordinary, popular signification.
- A testator by a will executed in the State of South Carolina, where he resided, directed a certain sum "to be invested in the purchase of slaves, for the use of S. during her life, and, after her death, said slaves to return and vest forever in her sons M. and R., and the heirs of their bodies." M. and R. were in existence at the time of the devise: Held, that the object of the testator was to give a life estate to S., and, after her death, the full property to M. and R.; that such a disposition is valid by the laws of South Carolina, where the common law, modified by statutes, prevails; that by the laws of that State slaves are considered personal property; that M. and R. had an estate in remainder, to be enjoyed after the life estate of S. had terminated, but which vested in them at the creation of the particular estate; and that, on the death of S. and the terminated.

tion of her estate, M. and R., or their heirs, became entitled to the possession and enjoyment of the property as tenants in common.

Where property acquired under a will executed in another State is brought by the legatee into this State, where he dies, it must descend according to the laws of this State. The right of inheriting property situated here cannot be governed by the laws of another State, though originally acquired and brought from that State.

This action was instituted before the Court of Probates for the parish of East Feliciana. The Judge of that court having been recused, the case was transferred to the District Court of East Feliciana, and the District Judge having been also recused. it was tried before Butler, Special Judge. The petition represents, that the plaintiff Sarah Ann was married on the 5th of January, 1826, to Robert Weston, then a resident of the parish of East Feliciana: That she had by that marriage one child, Robert P. Weston: That her husband, Robert Weston, died on the 22d of September, 1827, intestate, leaving the said Robert P. Weston, who survived him, his universal heir: That she was married to her present husband, Albert G. Penny, on the 21st of December, 1830: That her son, Robert P. Weston, died on the 4th of August, 1832, leaving her his universal heir, and as such entitled to all the rights of said minor to the undivided moiety of certain slaves bequeathed to his father by William Scott, late of the State of South Carolina, with their increase, as well as to all the rights of said minor in the succession of his father: That Malachi Weston, Sen., the grand-father of said minor, was married to Sarah Scott of the State of South Carolina, where both resided at the time of the marriage, and until the year 1818, when they came to this State, and settled in the parish of East Feliciana: That they had two children by their marriage, Malachi Weston, Jr., and Robert, the first husband of the petitioner, whom they brought with them to this State, with certain slaves (whose names are given:) That the said Malachi Weston, Sen., the father of petitioner's first husband, died about the 1st of January, 1822, leaving his widow Sarah Weston, and two sons, Malachi Weston, Jr. and Robert Weston, his only legitimate heirs, and as such entitled to their share in the community which existed between the deceased and their mother, and to one undivided half of said slaves and their increase: That the said slaves were personal property in the State of South Carolina, and by

virtue of the marriage of Malachi Weston, Sen. with said Sarah Scott in said State, belonged exclusively to the husband as his separate property: That Sarah Weston, after the death of her husband, on the 5th of March, 1822, caused an inventory to be made of the property left by him (the details of which are given,) but that she did not include therein any of the slaves born in this State from those brought by her husband from South Carolina, (the names of the slaves born in this State being given,) nor the crops made on the plantation on which the deceased resided at the time of his death, as she was bound to do, but that said Sarah Weston and her son Malachi Weston, Jr. took possession of all said property, plantation, slaves, &c., and have enjoyed the same, with the revenues thereof, since the death of Malachi Weston, the father, refusing to give the petitioner, Sarah Ann, her legal share thereof, to wit, one-half of said slaves and their increase, with one-half of the crops made by their labor, and her own fourth part of said community property remaining after payment of the community debts. The petition alleges, that the said Sarah and Malachi Weston, Jr. must have made enough from the labor of the slaves on the plantation to discharge all the separate debts of the deceased, and all the community debts existing against the property, and to leave a balance exceeding \$20,000, to one-half of which the petitioner is entitled, and to secure which he has a privilege upon the half of said slaves inherited by said Malachi Weston, Jr.: That said Malachi Weston, Jr. died on the 13th of July, 1838, intestate and insolvent, leaving a widow and three children: That the widow subsequently acted as natural tutrix of her minor children, but that having, in August, 1839, married one Richard T. Christmas, without having convoked a family meeting to determine whether she should be continued as tutrix, she has, ipso facto, forfeited the right to act as such; and that said Sarah Weston has since died.

The petition further alleges, that William Scott left by his last will the sum of \$5000 to be expended in the purchase of slaves to be settled upon said Sarah Weston during her life, and the fee, or right of property therein to be vested forever in equal portions, in said Malachi Weston, Jr. and Robert Weston, and the heirs of their respective bodies: That certain slaves (whose names are

given.) were purchased with said sum, and received many years ago by said Sarah, who enjoyed the usufruct thereof and possessed the same, with their increase, till her death: That the life estate of Sarah Weston terminated with her life on the 29th of May, 1839, from which time the petitioner Sarah Ann alleges that, as the only heir of her son, she has been entitled to claim the one-half of said slaves and of their increase, the other half thereof belonging to the minor children of said Malachi Weston, Jr.: That said minors are named William S., Francis P., and Sarah E. Weston: That one Carter is the under tutor of said minors: That the petitioner has a right to a partition of said slaves and of The petition prays, that an inventory may be their increase. made of the separate property of Malachi Weston, Sen., to wit, of the said slaves and their increase, and of the property belonging to the community existing between the said Malachi Weston, Sen, and Sarah Weston, consisting of the plantation on which they lived, certain slaves, crops of cotton and corn, moveables, &c.; that a curator, ad hoc, may be appointed for said minors and be cited to be present at the taking of said inventory; that the legal representatives of said Sarah Weston be also cited to appear; and that said separate and community property be sequestered until the decision of the suit; that a tutor, ad hoc, be appointed to the minor children of said Malachi Weston, Jr., in order to effect the partition of said slaves and their increase, and that he be cited to answer this petition; that a partition of said slaves and their increase be made; and for general relief, &c. By an amended petition plaintiffs prayed, that the will of William Scott, or a certified copy thereof, might be recorded, and the execution thereof ordered. Another amended petition was filed, which it is unnecessary to notice.

Richard T. Christmas and Elizabeth M. Christmas, his wife, stating themselves co-tutors of the minor Sarah Eliza Weston, excepted to the action, alleging that a judicial partition should be made of all the property of the succession and a settlement of all the accounts of the co-heirs, which is not prayed for. 'They allege further, that all those who should have been made parties have not been joined in the suit, averring that Sarah Weston was married to one Abijah Croft, by whom she had children, all

of whom have died; but that one of them, John Croft, left two children; that one of them, Sarah, married William Griffith, and the other, Abiah, died in 1838, leaving two legitimate children. John and Abiah, who are minors represented by their mother now the wife of Bailey D. Chaney, all of whom are interested in the succession of Sarah Weston, the mother of said John Croft. and should have been made parties. They pray that the suit may be dismissed. &c. An exception was subsequently filed by the same parties to the jurisdiction of the court, in which they allege, that the action is a petitory one to recover slaves, not alleged to appertain to any succession, but to be in the possession of the respondents. They also excepted on the further ground. that the minor Sarah Eliza Weston is the sole owner of the slaves derived from the will of William Scott, being the sole surviving heir of the bodies of Robert Weston and Malachi Weston, Jr., and in possession of said slaves as such. They subsequently filed an answer in which, after a general denial, they aver that Sarah Eliza Weston, the only legitimate child of Malachi Weston, Jr., deceased, is the only person entitled to the slaves sued for: that Sarah Weston, the owner of the life estate in said slaves survived her son Robert Weston and her only child, and that when the life estate of Sarah Weston subsequently terminated by her death, the said slaves became the property of the minor children of Malachi Weston, Jr.; and that the said Sarah Eliza, being the only surviving child of said Malachi, is entitled to the whole of said slaves to the exclusion of all other persons. respondents further allege, that the legacy was a joint one; and that it clearly appears from the will to have been the intention of the testator, that the slaves directed to be given to Sarah Weston during her life, should afterwards vest in the said Malachi and Robert Weston, or the heirs of their bodies, from which it is evident that the survivor, at the death of Sarah Weston was entitled to the whole of said slaves. They pray that plaintiffs' claim may be rejected, and the slaves decreed to be the property of Sarah Eliza Weston; and for general relief.

Sarah Croft, assisted by her husband William Griffith, and the mother and tutrix of the two minor children of Abiah Croft deceased, intervened. They denied all the allegations in the plain-

tiffs' petition not specially admitted. They averred, that the late John Croft was the son and heir of Sarah Weston by a former marriage; that Sarah Croft, now Griffith, and the two minor children of Abjah Croft, deceased, are the heirs of said John Croft; that the property inventoried on the 5th of March, 1822, belonged to the community existing between Sarah Weston and her husband Malachi Weston, Sen., with the exception of certain slaves (whose names are given,) who belonged to the said John Croft; that all the other slaves and property mentioned in the petition were the separate property of said Sarah Weston, or of her son They further aver, should the pretended will of William Scott, and the transfer from Oliver, be shown to be genuine, and the slaves be identified therewith, and the will and transfer be proved to have been executed in South Carolina, that neither the plaintiffs nor the heirs of Malachi Weston, Jr. have any title to said slaves; because, if the will and bill of sale be construed by the laws of the State in which they were intended to be carried into effect, and where the said Sarah Weston, Robert Weston, and Malachi Weston, Jr., all resided, they are null and void as containing a substitution and fidei-commissum: and, if construed by the laws of South Carolina, the said Sarah Weston, having survived the said Robert Weston and Malachi Weston, Jr., became the absolute owner thereof.

The intervenors further allege, that on the 24th of December, 1824, Joseph Scott, in whom the title to the said slaves vested, conveyed them to John Croft, the ancestor of the intervenors; that he left them in the possession of Sarah Weston, who held possession of them as owner for more than fifteen years by open, peaceable and uninterrupted possession; wherefore they plead the prescriptions of five, ten, and fifteen years, as against the plaintiffs and their co-defendants; averring that, if the said Sarah Weston be not entitled to said negroes, they (the intervenors,) are, as heirs of John Croft. They allege, that all the property mentioned in the petition, not admitted by them to be community property, was the separate property of said Sarah Weston. They deny the heirship of the plaintiff Sarah Ann, or her right to claim any thing from the succession of Malachi Weston, Sen., or of Sarah Weston, averring that the only partition which can

be made by the court between themselves and the heirs of Malachi Weston, Jr., is of the succession of said Sarah Weston, and that the heirs of Malachi Weston, Jr., represented by their tutor and tutrix, are estopped from contesting the right of Sarah Weston to the negroes described as her separate property by a joint answer of Sarah Weston and Malachi Weston, Jr., to a petition filed against them by the plaintiffs in a former suit, in which those respondents alleged the said slaves to be the separate property of said Sarah. They conclude by praying, that the plaintiffs' demand may be rejected, and that the estate of Sarah Weston, deceased, including the said slaves, may be partitioned between their co-defendants and themselves.

So much of the petition as relates to any other property than the slaves claimed under the will of William Scott was struck out, by consent. It was admitted, that Christmas and wife had been appointed tutor and tutrix to the minor children of Malachi Weston, Jr., deceased, they having been made parties defendant on the motion of plaintiffs' counsel: That William S. and Francis P. Weston, two of those minors, were dead: That Robert Weston married Sarah Ann Kirkland, one of the plaintiffs, on the 5th of January, 1826, and had issue one son, Robert P. Weston, who survived his father: That Robert Weston, the father, died on the 22d of September, 1827, and Robert P. his son, on the 4th August, 1832, and that his mother survived him, having in 1830, married her present husband, Penny: that Malachi Weston, Jr. married Elizabeth M. Howell, by whom he had three children, and that he died in 1838, leaving his widow and three children surviving; and that the widow married R. T. Christmas: That Malachi Weston, Jr., and Robert Weston were the children of Malachi Weston, Sen., and Sarah Weston, and that they are the persons mentioned in the will of William Scott: That Sarah Weston died in May, 1839, having survived her sons Malachi and Robert, and the only child of Robert, leaving the slaves in contest and their increase in her succession: That Malachi Weston, Sen., and his wife Sarah, came from South Carolina, where they were married, to reside in this State, in the year 1818 or 1819: That the slaves were received by Sarah Weston after the death of her husband, in the year 1823, or 1824: That Wil-

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liam Scott died in South Carolina towards the end of 1822, or beginning of 1823, and that Joseph Scott was his executor: That John Croft died some two or three years before Sarah Weston.

The case having been taken up on the exceptions, the plea to the jurisdiction of the court was overruled; and the will of William Scott, of which a duly authenticated copy had been produced, was ordered to be recorded and executed.

On the trial the plaintiffs offered in evidence the inventories of the estates of Sarah Weston, and Malachi Weston, Sen.; the will of William Scott; a duly certified copy of the statute of the State of South Carolina, of 19th February, 1791, entitled an act for the abolition of primogeniture and for the giving an equitable distribution of the estates of intestates and for other purposes; and evidence to establish, that the common law of England, except so far as modified by statute, prevails in that State. There was also an agreement, that all the standard authorities on the common law might be referred to as evidence of that law. The record of the suit between the plaintiffs and Sarah Weston and Malachi Weston, Jr. was produced in evidence; and the bill of sale from Oliver to Sarah Weston for the negroes purchased under the bequest of William Scott, dated 1st July, 1823, and that from Joseph Scott to John Croft, dated the 24th of December, 1824, for the same slaves.

The clause in the will of William Scott out of which the present action arose, is in these words:

"I request and do hereby empower my acting executors to lay out five thousand dollars in the purchase of young and valuable negroes for the use of my sister, Sarah Weston, during her life, and after her death said negroes to return and vest forever in her sons Malachi and Robert Weston, and the heirs of their bodies."

There was a judgment below ordering the slaves to be partitioned equally between the plaintiff Sarah Ann, and the heirs of Malachi Weston, Jr. From this judgment the defendants appealed.

Boyle, for the plaintiffs. The controversy in this case depends upon the legal construction and effect of the bequest made by William Scott. The will was made in South Carolina where the testator lived and died, where his executors also lived, and where

his will was probated. The mass of his property, except that portion bequeathed to his sister Sarah Weston and her sons Malachi Weston and Robert, was given to other relatives living in There is no principle of law better settled than, South Carolina. that all rights to the personal estate of a testator must be governed by the law of the place where the bequest is made. "It has its rise," says Story, "in the comity which all civilized nations extend to each other." Conflict of Laws, 19, 30, 33, 36, 232, 233. The interpretation and proof of wills is invariably governed by the law of the place where they are made Ibid. 311, 315, 319, 391. 394. In the case of Dixon's Ex'rs v. Ramsay's Ex'rs, 3 Cranch, 319, the Supreme Court of the United States decide, in so many words, the principle contended for, that all rights to personal estate under a will are to be governed by the law of the place where the will is made. A similar case is to be found in the Connecticut Reports, 1st vol. p. 547. Our own decisions are in-strict conformity. In an early case, (Morris v. Eves, 11 Mart. 730.) Judge Porter asserts the doctrine in the language of Emerigon, Traité Des Assurances, ch. 4, sect. 8. Dig. lib. 21, fol. 2: "A contract made in a foreign country is governed by the laws of that country, in every thing which relates to the mode of construing the meaning to be attached to the expressions by which the parties may have engaged themselves, and the nature and validity of that engagement." In the case of Olivier v. Townes, 2 Mart. N. S. 93, the same Judge re-asserts the doctrine and refers to Huberus, of whom he says, "that his authority is more frequently resorted to than any other writer upon this subject, because he treated it more extensively and with greater ability." There are two cases to be found in 5 Mart. N. S. that of Day and Wife v Thibodeau, p. 49, and Saul v. His Creditors, p. 587. 'The first declares, that a will valid and legal according to the laws of the country where it is made, vests a title; while the last confirms the former opinions of the court, and lays down the sole exception to the rule, namely: "That although contracts are governed by the law of the country where they are made, yet they cannot be enforced to the injury of the State whose authority is invoked to carry them into effect." In the case before us, it cannot be pretended that the demand of the plaintiffs, if granted, would bring Vol. VII. 62

with it such a result. It is unnecessary to refer to the case relied upon by the adverse counsel from 3 Dallas, 369; as it only decides a question often settled, that the insolvent law of one of the States does not release a debtor from the pursuit of his creditor in any other. The reference to Huberus in the note is good authority for the plaintiffs.

What are the rights of the parties to the present action under the will of Wm. Scott, of South Carolina, and how are those rights affected by the laws of that State? It is in proof, that the common law of England, except so far as that law is modified by the statutes of the State, is the law in force there. Much of our difficulty in ascertaining the rules and principles of that law, is obviated by the agreement that this court and the counsel may refer to the standard law writers on the common law. It is also in proof, that in South Carolina, slaves are regarded as personal property. From 2 Bay, 397, it is shown, that the statute of Edward. De donis conditionalibus, was never in force in South Carolina; and from a certified copy of the statute law in relation to "Descent and Distribution," that the common law incident of survivorship in cases of joint-tenancy has been expressly repeal-Using the technical language of the common law in describing the bequest in his will, we find that it is a disposition known as an executory devise, in which, from the anxiety of the courts to carry into effect as far as possible the intent of the testator. larger powers were yielded to the testator in disposing of his estate than in other modes of conveyance. It needs no particular estate to support it. By it a fee simple, or other less estate, may be limited after a fee simple. By it, a remainder may be limited of a chattel interest after a particular estate for life created in the Chitty's Blackstone, vol. 1, book 2, p. 17. Had Wm. Scott. by grant or deed, made such a disposition of the sum of \$5000 to be laid out in negroes, (which all admit amounts to the same thing as so many negroes,) the interest given would have been a conditional fee at common law, because being chattels, they would not have been governed by the statute de donis, so as by its operation to be converted into an entailed estate; and that statute. according to Bay, never was in force in the State of South Carolina. The grantee of a fee conditional at common law, the mo-

ment he came into possession as owner, had the right of absolute disposal of the property, if that property consisted in chattels; if of real estate, the moment issue was born to him. 1 Blackstone, Book 2, p. 113. The analogy between the case before the court and the old conditional fee at common law, is adverted to, to explain the error into which one of the counsel for the defence has fallen in contending, that by the common law Mrs. Weston was the first taker, and held therefore in fee. Had the conveyance been by deed, and not by last testament, giving to Mrs. Weston and the heirs of her body the property, and not its use, he might have been correct.

But the disposition of William Scott by last will and testament is an executory devise, and is now governed by settled rules. They are laid down clearly and distinctly by Blackstone, 1 vol. book 2, marginal page, 175, in these words: "By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed; for by law, the first grant of it to a man for life, was a total disposition of the whole term, a life estate being esteemed of a higher and larger nature that any term of years, And at first, the courts were tender, even in the case of a will, of restraining the devisee for life from alienating the term, but only held, that in case he died without exerting that act of ownership, the remainder over should then take place; for the restraint of the power of alienation, especially in very large terms, was introducing a species of perpetuity. But soon afterwards it was held, that the devisee for life had no power of aliening the term so as to bar the remainderman, yet in order to prevent the danger of perpetuities, it was settled, that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they must all be in esse during the life of the first devisee, for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainderman who happens to survive the rest; and it was also settled, that such remainder may not be limited to take effect unless upon such contingency as must happen, if at all, during the life of the first devisee." The devise of Wm. Scott is in accordance with all these rules. Mrs. Weston and her children were

living at the date of the will; and, to use the illustration of the author, burnt out nearly together, the sons leaving issue competent to take under the terms of the devise, living at the time of their death. In note 23 to the same page of Blackstone, we find this language from Fearne, the highest authority on this subject: "It has long been fully settled, that a term for years, or any chattel interest, may be given by an executory devise to an unborn child of a person in existence when it attains the age of twenty-one; and that the limits of executory devises of real and personal property are precisely the same." Blackstone again says, p. 398: "By the rules of the ancient common law, there could be no future property to take place in expectancy created in personal goods and chattels: because being things transitory, &c. But yet in last wills and testaments, such limitations of personal goods and chattels in remainder after a bequest for life were permitted, though originally that indulgence was only shown, when merely the use of the goods, and not the goods themselves, was given to the first legatee; the property being deemed all the time to remain in the executor of the devisor. But now that distinction is disregarded: and if a man either by deed or by will limits his books, or furniture, to A. for life, with remainder over to B. this remainder is good."

But it is contended that the will contains a substitution. Tested even by the laws of this State, there is no substitution—the bequest to Sarah Weston is but of an usufruct. Civ. Code, arts. 525, 527, 532, 533. But the will must be governed by the laws of South Carolina, where the doctrine of the Louisiana and French Codes on this subject is unknown.

Lobdell, on the same side. The bequest gave a life estate to Sarah Weston, with the remainder to Malachi and Robert Weston, as tenants in common. See the Statute of South Carolina of 17 Feb. 1791. 2 Bay's S. C. Rep. 397. 4 La. 94. Young-blood v. Flagg, 11 La. 337. Laprie v. Smith, 13 La. 91. Brosnaham v. Turner, 16 La. 433. Bevine v. Patton, 17 La. 589. 4 Griffith's Law Register, 846, 847, 848, 853, 866, 867. 1 Brown's C. C. 274. 3 Ibid. 101. Christian's Notes to Black. Comm. book 2, p. 428. Precedents of Wills, pp. 2, 160, 196,

197, 214, 253, 254, 233, 331, 357 to 370, 389, 398, 418, 419, 448, 451, 458, 498, 504, 529, 633.

Whether the will be construed according to the laws of England, of South Carolina, or of this State, the fee, or absolute or full property vested in Malachi Weston, Jr. and Robert Weston. Cloutier v. Lecompte, 3 Mart. 485. Farrar v. McCutcheon, 4 Mart. N. S. 45. Arnaud v. Tarbe, 4 La. 502. Duplessis v. Kennedy, 6 La. 271. Clague v. Clague, 13 La. 1. State v. Bermudez, 13 La. 221; and 17 La. 485. Bernard v. Goldenbow, 18 La. 95. Ibid. 21. 1 Robinson, 115. Nouveau Repertoire, verbo, Substitution. 5 Toullier, book 3, tit. 2, ch. 1, Nos. 10, 504. Civil Code, arts. 525, 527, 533, 534, 536, 1507, 1508, 1509. Story's Conflict of Laws, pp. 19, 30, 33, 36, 232, 311, 315, 319, 391, 394. Blacks. Comm. book 2, pp. 111, 113, 398.

The estate of Sarah Weston terminated with her life. The heirs of Malachi Weston, Jr. and Robert Weston are entitled to the slaves and their increase, as tenants in common; and the plaintiff Sarah Ann, as the universal heir of her son Robert P. Weston, the sole heir of Robert Weston, has a right to a partition, and to be put in possession of one-half of the slaves and their increase. Civ. Code, arts. 866 to 870, 873, 876, 880, 882, 898, 903, 934 to 940, 932, 1214. Hicks v. Pope, 8 La. 554.

A. M. Dunn and Preston, for the appellants, This action must be dis nissed for want of jurisdiction in the Probate Court. Badon v. Foucher, 15 La. 455. The will of Scott relied upon by plaintiffs, shows that the property in dispute does not belong to the succession of Sarah Weston. The action is a petitory one, and should have been brought before a court of ordinary jurisdiction.

By whatever laws the case is to be governed, one universal principle pervades all systems of jurisprudence in the interpretation of wills. The intention of the testator must be sought by the interpretation of words in their ordinary acceptation.

Here the testator says: "I request and empower my executor to lay out \$5000 in the purchase of negroes." Now, negroes purchased with the money of the estate belong to the estate. Not a dollar, nor a negro is conveyed to any person by the will. The money before used, and the negroes ofterwards, belonged

to the estate. By the words, "for the use of my sister Sarah Weston, during her life," the testator does not convey a life estate in the negroes to her; he does not bequeath them to her for a term; he gives her no property; but requests that these negroes be provided, at the expense of his estate, for her use during her life. There is no usufruct created; that was unknown to the laws of South Carolina. No property is transferred to her that can be sold by her; there is only property provided belonging to the estate of the testator, which she is authorized to use. No estate is vested in her.

The next words are: "And after her death said negroes to return"—to whom? To Malachi and Robert Weston, who never owned them? No—to return to their owner, to the estate of William Scott, to which they belonged, and out of which the title had never been divested. A thing returns where it was; not where it never was. The negroes never belonged to Malachi and Robert Weston, and therefore never could return to them. They belonged to the estate of William Scott because they were purchased with its funds, and therefore could at all times return to the estate from which they temporarily went. The word return would be absurd, if applied in any other way.

After their return what is to be done with them? He requests that they then be vested in Malachi and Robert Weston, and the heirs of their bodies. The whole title and estate is then transferred to, and vested in them, that is to say, "after the death of Mrs. Weston." The will says so in so many simple words. But to vest in them after the death of Mrs. Weston means, it is said, to vest in them before her death, to wit: at the moment of the testator's death.

To decide that the gift shall vest before Mrs. Weston's death, when the testator wills that it shall vest after her death, is to decide that he means by his will that which we know he does not mean, and that he wills that which we know he does not spill.

It was the intention of the testator that the whole property should vest in his grand-nephews and nieces, because he gave the whole to his nephews; and the heirs of their bodies, and not to their heirs generally. The defendants are the whole

of those nephews and nieces. He did not intend that the negroes should in any event go to strangers, such as the plaintiffs are.

It is contended that the will is to be construed by the laws of South Carolina. If so, the legacy cannot ascend from son to mother.

Muse and Merrick, for the intervenors. The will must be construed according to the laws of this State as to the disposition in favor of Sarah Weston and her son, which was to be executed here. Civ. Code, art. 10. 3 Rob. 262. Story, Conflict of Laws, § 280. The disposition contains a substitution, or fidei-commissum, forbidden by the laws of this State. The slaves being in possession of Sarah Weston or her heirs, they have a right to retain them against persons claiming under a defective title. Civ. Code, art. 1507. 4 Mart. N. S. 45. 4 La. 502. 13 La. 2. The disposition is absolutely and entirely void. 5 Toullier, p. 52, No. 40.

But if the will is to be governed by the laws of South Carolina, still the whole property must vest in Sarah Weston, an estate tail in things personal having been given to her. "Where an estate tail in things personal," says Blackstone, (Chitty's ed. book 2, p. 398,) "is given to the first, or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted." Ibid. p. 175, note 9. See also 2 Kent's Comm. 352, 361. 3 Tomlin's Law Dict. verbo, Tail, pp. 554-5. 1 Co. Litt. 20. 1 Bro. C. R. 274. 2 Blackst. 114. That an estate tail was created by the bequest, see 3 Tomlin's Law Dict. 557. 3 Salk. 338. 1 Inst. 28. 2 Id. S55. 5 Mod. 266. 3 Salk. 237. Dyer, 334.

Bullard, J. The last will of William Scott of South Carolina, contained the following clause, out of which the present controversy has arisen: "I request and do empower my acting executor to lay out \$5000, in the purchase of young and valuable negroes, for the use of my sister Sarah Weston, during her life, and after her death, said negroes to returnand vest forever in her sons Malachi and Robert Weston, and the heirs of their bodies." The will was duly probated in South Carolina, and, in pursuance of the above recited bequest, that sum was employed in the purchase of slaves, which were conveyed to her by one

Oliver, according to the terms of the will. The legatee resided with her two sons in Louisiana, though the will was made and probated, and the testator lived and died in South Carolina, where that clause was carried into effect. Sarah Weston died in 1839, in possession of such of the slaves as survived, and their increase. Robert Weston, one of the remaindermen, married the present plaintiff, Sarah Ann, and died, leaving one child, Robert T. Weston, who afterwards died without issue, and his mother, the present plaintiff, became his sole heir at law. In that capacity she claims in this suit the partition of the slaves in question, between herself and the heirs of Malachi Weston.

Other heirs of Sarah Weston, issues of a former marriage with Croft, intervene, and claim to participate with the other parties in the same slaves, alleging that they were the property of Sarah Weston.

The court below being of opinion, that Sarah Weston, according to the laws of South Carolina, had but a life estate, with remainder over to her two sons, who were in esse at the time of the bequest, as tenants in common, and that the plaintiff is the sole legal representative of Robert Weston, one of them, decreed a partition between her and the heirs of Malachi Weston, Jun., and the latter have appealed.

It is first urged by the counsel for the appellants, that the Court of Probates erred in not sustaining the plea to its jurisdiction. He contends, that the heirs of Malachi Weston being in possession, and the parties not claiming as heirs of Sarah Weston, the action is essentially petitory, and should have been brought in a court of ordinary jurisdiction. He relies upon the case of Badon's Heirs v. Foucher et al., 15 La. 455.

In that case the intervening party set up a title adverse to that of the original parties in the Court of Probates, who were prosecuting an action of partition of property held by them as coheirs, and this court held, that although the Court of Probates might inquire into questions of title arising incidentally between parties litigating before it, with a view of carrying out the partition; yet that it was incompetent to pronounce upon the question of title asserted by the intervenors, which was wholly adverse to that of the parties, derived from a different source, and

not from a common ancestor. In the case now before us, the party pleading to the jurisdiction traces back his title to the same source with that of the plaintiff, to wit, the will of William Scott. It is true, the property to be divided does not belong to the estate of Sarah Weston, and the parties do not claim as her heirs, (except the descendants of Croft, whose pretensions will be noticed hereafter,) but both the heirs of Malachi Weston, Jun., and of Robert Weston, claim as legatees under the will of Scott. The court, therefore, did not err in maintaining its jurisdiction.

The next question which has been discussed is, whether the lights of the parties are to be decided according to the law of South Carolina, or that of Louisiana. Although the legatees, Mrs. Weston and her sons, were residents of Louisiana, yet the testator, William Scott, was a citizen of South Carolina. His will was made, published, probated, and carried into execution there. Its validity and effect, and the degree of estate which it conferred upon the legatees, especially as it relates to personal effects situated in South Carolina, must, in our opinion, be tested by the law of the domicil of the testator and not that of the legatees. It is, therefore, to the laws of that State we are to look for guidance in pronouncing upon the rights of the parties, so far as they depend upon the will. 3 Cranch, 319. Story, Conflict of Laws, 19, 30, 232-5.

The conveyance of Oliver may be laid out of view, and the parties regarded as holding directly by the devise in the last will of Scott, although it purports merely to direct the investment of a sum of money; for, in the construction of wills, money ordered to be invested in any species of property, is always regarded as if the property itself were devised. Money to be employed in the purchase of land, is treated as land.

In the construction of wills, the intention of the testator is to be ascertained and followed, and the language used by him to be understood according to its ordinary, popular acceptation. In the case now before us, the testator directed the investment of \$5000 in slaves, "for the use of [his] sister, Sarah Weston, during her life, and after her death, said negroes to return and vest forever in her sons, Malachi and Robert Weston, and the heirs of their bodies." The intention of the testator appears to us

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quite clear. It was to give a life estate in the slaves to his sister, and the full property in them, or the fee, after her death, to his two nephews, who were in existence at the time of the devise; and the question is, whether such a testamentary disposition be valid by the laws of South Carolina, and what degree of estate vested in the two sons, and when did it vest.

It is admitted that the common law of England, modified by statute, prevails in that State; and that we may refer to standard works upon that system of jurisprudence for information on this subject. Slaves, it is also shown, are considered in South Carolina as personal property or chattels.

Robert and Malachi Weston we have said, had an estate in remainder, which is defined to be an estate limited to take effect and be enjoyed after another estate is determined. 1 Blackstone, book 2, chap. 11. Both their interests are in fact only one estate; the present term of years, and the remainder afterwards, when added together, being equal only to one estate in fee. They are, indeed, different parts, but they constitute but one whole. They are carved out of one and the same inheritance. They are both created, and may both subsist together; the one in possession, and the other in expectancy. Ibid. Loco citato. We learn from the same authority, that if A. be tenant for life, remainder to B. in esse, the remainder is vested in him at the creation of the particular estate.

According to these principles, which it appears from authorities before us, are recognized by the courts of South Carolina as existing in that State, we do not doubt, that the estate in remainder vested in Malachi and Robert Weston; and that, on the death of their mother, and the termination of the particular estate, they or their heirs had a right to the possession and enjoyment of the estate as tenants in common. See statute of South Carolina, in the record.

The pretensions of the heirs of Croft, childen of Sarah Weston by a former marriage, rest upon the hypothesis that the slaves vested in full property in Sarah Weston, in whose right they claim, and that they descended to be equally divided between all her heirs, according to the laws of Louisiana. They contend, that the will of Scott contains a substitution, which is reprobated

by our laws, and that consequently the full property vested in Sarah Weston. It is not so clear that even according to our laws, the disposition in the will would be regarded as a substitution. The testator might well give to one the usufruct, and to another the full property; and the testament might bear that construction, as that appears to have been manifestly the intention of the donor. Be that as it may, we are clearly of opinion that the validity of the will, and the title of the parties under it, are to be settled according to the law of South Carolina, and not that of Louisiana.

But it is only as to the degree of interest acquired by Mrs. Weston, and her sons under the will, that the law of South Carolina is to govern. When the property was brought into this State, and one of the co-proprietors died, his title descended according to the law of Louisiana. Whoever was his heir according to our laws, became at once vested with all his property situated here, wherever it may have been acquired, or by whatever title held. On the death of Robert Weston, his son, who survived him was seized at once of his right in the slaves in question; and on his death, his mother succeeded to his rights in the same We cannot adopt the laws of South Carolina as to the right of inheriting property situated here, although originally acquired in and brought from that State. The laws of no State can have such extra-territorial operation, or give such a direction or destination to personal property acquired within its limits when afterwards removed from it, as to derogate from the laws regulating the distribution of estates in the State to which it may have been removed. We are not to look to the laws of South Carolina to ascertain who is the heir of Robert Weston, in relation to particular property brought by him or his mother from that State, and of which he died possessed here.

We conclude, that the court below did not err in coming to this conclusion, and in decreeing a partition between the plaintiff Sarah Ann Penny, and the heirs of Malachi Weston.

Judgment affirmed.

Andrew P. Simpson v. Valerien Allain, late Sheriff.

7, 600 51 450

Where the return made by an officer on a fi. fa. recites that his predecessor had seized in the hands of A. in his capacity of Sheriff, certain notes or bonds, but they were not actually seized and taken into possession by the officer, but were kept by A. and subsequently handed over to his successor in office, there is no legal seizure. Per Curiam: The officer should have taken the notes or bonds into his possession, or at least, have called upon A. for their delivery, when, in case of his refusal, the plaintiff, so long as a fi. fa. remained in the hands of the officer, would have been entitled to his remedy under sect. 13 of the Statute of 20th March, 1839.

To make a legal and valid seizure of tangible property, in the hands of a debtor or of a third person, by which the seizing creditor may acquire a privilege on the thing seized, the sheriff must take the object into his possession. The 10th sect of the Statute of 10th February, 1841, provides for the only exception to this rule where the property is in the possession of one of the Sheriffs created by it under a previous seizure.

The remedy given by sect. 13 of the act of 20th March, 1839, is applicable only where the plaintiff has applied for a writ of fi. fa.

Bonds received by a Sheriff in his official capacity should, on his ceasing to act as such, be delivered to his successor.

APPEAL from the District Court of the First District, Bu-chanan, J.

Hoffman, for the plaintiff. The seizure of the bonds in the hands of Allain, constituted him the agent of the Sheriff for their collection. The return of a fi. fa., after seizure, leaves the writ in full force. 5 Mart. N. S. 286-7. 2 La. 280. 2 Robinson, 341-2.

Deslix, on the same side.

Bodin, for the appellant, contended that there had been no valid seizure of the bonds or notes, citing Bacon's Abridg. verbo Execution, A. p. 685.

Simon, J. The pretensions of the plaintiff against Valerien Allain, ex-sheriff of the parish of Orleans, are founded on the following state of facts and circumstances disclosed by the record: It appears, that on the 11th January, 1843, a suit was instituted by the plaintiff against Adéle Wiltz, and her husband Evariste Wiltz, and against Mary Pailhes and her husband, to recover of them, in solido, the sum of \$450, with interest. On the 14th of the same month, the defendants Wiltz confessed a judgment for

the amount claimed in the plaintiff's petition, whereupon, on the same day, a final judgment was rendered and signed by the District Court in favor of the latter. On the same day, (14th January, 1843,) a writ of fi. fa. was issued on the judgment, directed to the Sheriff of the District Court, which was returned by the deputy sheriff on the fourth Monday of February following, (the day fixed in the writ,) in the manner following, to wit: "Received, 14th January, 1843. My predecessor had seized on the same day in the hands of Valerien Allain, Esq., Sheriff of the parish of Orleans, two notes or bonds of Charlotte Ganches, favor of Augier and C. Cabornet, received by the said Sheriff Allain in the case of Adele Montreuil, wife of Evariste Wiltz, v. Moreau, dated 25th June, 1842, at 12 months, one for \$469 60, and the other for \$100. No other property found to seize, after due demand of both parties." In the mean time, the suit went on against Pailhes and wife, a judgment by default was taken against them, which was made final on the 7th of March, 1843: and the record shows that a writ of fi. fa. was issued against Pailhes and wife on the 9th of August, 1843, directed to the Sheriff of the parish of Jefferson, returnable on the 4th Monday of September, but not yet returned.

It does not appear that any further proceeding was had against Wiltz and wife, after the return of the execution first issued against them. In the meantime, the bonds seized in the hands of V. Allain became due, (25th June, 1843,) and nothing shows that any thing was ever done on the execution issued against Pailhes and wife, when on the 24th of November, 1843, (nearly nine months after the return of the first writ,) the plaintiff presented a petition to the court, a qua, in which he prays that Valerien Allain, late Sheriff of the Parish Court, in whose possession he believes the credits heretofore seized against Mrs. Wiltz were at the time of the seizure, may be cited to answer certain interrogatories, which were answered as follows: 1st. That he, V. Allain, has been in possession of two bonds, the description of which corresponds with that given in the first question, in both of which the costs of suit were comprised.

2d. That different notes of seizure were lodged in his hands in

relation to said bonds; that the one from the District Court was not the first, and was served on the 14th January, 1843.

3d. That said bonds have not been paid in his hands. That when he resigned his office as Sheriff, he delivered them over to his successor in office, through Armand Pitot, Esq., one of his attorneys, and that he has not held or seen them since.

On the 7th of December ensuing, on plaintiff's suggesting to the court, that there was an error in Allain's answer to the second interrogatory, it was ordered, that he be ruled to show cause why plaintiff should not contest the correctness of said answer; and why, notwithstanding said answers, he, said Allain, should not pay over forthwith to the Sheriff of the District Court, the sum of \$569 69, the amount of the two bonds seized by the said Sheriff.

On the trial of the rule several witnesses were examined, the purport of whose testimony goes to establish, that the bonds in question were delivered by Allain to Armand Pitot, as one of the attorneys of his successor; that they were unpaid; and that an order of seizure and sale was obtained thereon on behalf of the new Sheriff. Pitot testifies, that he does not know by what authority he demanded the bonds of Allain, but that he was anxious to have them paid, and took them to have the property sold. He also states, that he did not demand the bonds of Allain on behalf of any body; they were about falling due, and Allain told him, that as he was the Sheriff's attorney, he had better take the bonds. That he did so, had the bonds protested, and issued an order of seizure and sale thereon. He further proves, that the right of Mrs. Wiltz in said bonds was sold to one Leaumont for ten dollars.

The testimony of D. Augustin, (Allain's successor in office,) shows in substance, that an inventory was made of all that was handed over to him by his predecessor; that the two bonds are comprised therein; that Denis and Pitot were his attorneys as Sheriff; and that Pitot never spoke to him of Allain's handing over the bonds in question. The deputy marshal of the City Court shows, that in the suit of Leaumont v. Mrs. E. Wiltz, the marshal seized all the rights of the defendant, Adéle Wiltz, in the suit brought by her against Moreau, which were sold to

Leaumont by the marshal for ten dollars, being the highest bid. It is admitted, that in the suit of *Dreux* v. *Mrs. Wiltz et al.* a seizure issued, which was lodged in Allain's hands, and subsequently satisfied, on the 12th of December, 1842.

The Judge, a quo, considering that the defendant Allain was, under the evidence, liable for the amount of the bonds seized in his hands, rendered judgment against him accordingly, making the rule absolute for the whole amount of said bonds; and the defendant has appealed.

The liability of the appellant to pay to the Sheriff of the District Court the amount of the bonds alleged to have been seized in his hands for the benefit of the plaintiff, whilst the appellant was Sheriff of the parish of Orleans, must depend upon the rights acquired by the plaintiff, by virtue of the action of the Sheriff of the District Court, under the execution issued on the 14th of January, 1843. If he acquired none, or if those which he then acquired were subsequently lost, it is clear he cannot recover.

We have already seen, that the execution under which it is pretended that the bonds in question were seized in the hands of the appellant, was returned on the fourth Monday of February. 1843, and that no further action was had upon it. The return of the Deputy Sheriff who states what had been done by his predecessor, and who does not pretend to show any act on his own part in the execution of the writ, goes no further than to show, that his predecessor had previously levied the execution by seizing in the hands of the appellant, in his capacity of Sheriff of the parish of Orleans, two notes or bonds made in favor of, and on their face belonging to other persons than the defendants in the execution; but nothing appears to have been actually seized and taken by the officer into his possession: on the contrary, the notes remained in Allain's possession, who continued to keep them, and who subsequently disposed of them by handing them over to his successor's attorney. Was this a seizure in the true sense of the law? It cannot be pretended that the proceedings had by the Sheriff of the District Court were in conformity with the 10th section of the law of 1841, (B. & C.'s Digest, 786,) for the bonds had never been seized by Allain, and were not in his hands subject to the privilege of any other seizing creditor; nay,

the admission contained in the record establishes, that the seizure which had been lodged in Allain's hands was satisfied long before the plaintiff's execution was issued. Allain did not keep the bonds as garnishee, as, at the time the execution was levied. no legal step whatever was taken to ascertain for whose benefit he held them, and to secure their production whenever necessary for the satisfaction of the execution under which the Sheriff was then acting. Considering those bonds, therefore, as property subject to be seized and sold to satisfy the plaintiff's execution, it was clearly the duty of the Sheriff, who had seized them (the two notes or bonds, &c.) and not simply the right of the defendants to them, and who thus knew where they could be found, to take them into his possession, or at least to call upon Allain for their delivery, and, in case of his refusal, the plaintiff, as long as the writ of fi. fa. was in the hands of the Sheriff, would have been entitled to his remedy under the 13th section of the law of 1839. Bullard & Curry's Digest, p. 458. But nothing of this kind was ever attempted; the bonds were left in Allain's hands, and a short time afterwards, the writ was returned. In the case of Goubeau v. New Orleans and Nashville Rail Road Company. (6 Robinson, 345,) we held in substance, that in order to make a legal and valid seizure of tangible property, from which the seizing creditor may acquire a privilege on the thing seized, it is necessary that the Sheriff should take the object seized into his possession; and that the mere levying of an execution upon property found in the hands of the debtor or of a third person, without showing that the Sheriff took it into his actual possession, at least when he levied the writ, is not sufficient to confer any right on the creditor. The law of 1841 already quoted is perhaps the only exception, when the property is in the possession of one of the Sheriffs whom it creates, and by whom it had been previously seized. Here again, no attempt was made by the Sheriff to take the bonds into his actual possession. The only evidence of the seizure consists in the written statement made by his successor's deputy, who does not appear to have ever acted under the writ: and, under such circumstances, we are constrained to say that the plaintiff has acquired no right under the seizure which

is the foundation of the present suit, and on which no further action was had either before or after the return of the execution.

With this view of the effect of the seizure relied on by the plaintiff, what right had he to garnishee the bonds in the hands of Allain nine months after the return of his execution, and during the pendency of the second execution issued at his request against Pailhes and wife for the same amount, and to call upon him for their delivery, or for the payment of the money? The 13th section of the law of 1839, already referred to, gives him this right only when "the plaintiff in a cause has applied for a writ of fieri facias." Here there was no writ of fi. fa. in the hands of the Sheriff of the District Court, at the time the interrogatories were propounded to the garnishee. Nothing had been seized by virtue of the first writ. In the mean time, certain other circumstances had taken place, in consequence of which the bonds were no longer in the appellant's possession; and we cannot say, that it was his duty to keep them, and that he is bound to account to the plaintiff for the manner in which those bonds were disposed of subsequently. Leges vigilantibus, non dormientibus serviunt.

Under this opinion, it is unnecessary for us to inquire into the legal bearing of the facts established by the appellant's answers to the interrogatories, and by the testimony of the witnesses. It seems, however, that the bonds in question were handed over by the appellant to the attorney of his successor in office, who was the person to whom it was his duty to deliver them. 17 La. 22.

But, however this may be, it is clear, that if any person has a right to call upon him to account for those bonds, it is not the plaintiff, whose rule should have been discharged.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed; and that the rule obtained by the plaintiff be discharged, with costs in both courts.

The Citizens Bank of Louisiana v. Buisson.

THE CITIZENS BANK OF LOUISIANA V. FREDERIC BUISSON.

Under the 24th sect. of the act of the 1 April, 1833, incorporating the Citizens Bank of Louisiana, which provides "that all property mortgaged to the bank for any purpose, may be seized and sold, at any time, according to law, in whosesoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession by succession or descent to heirs or legatees by last will and testament, or otherwise, in the same manner as if the same was in possession of the original mortgagor," the bank may obtain from a court of ordinary jurisdiction an order of seizure and sale against property mortgaged to it, though in possession of the executor of the mortgagor, on notifying the latter in order to give him an opportunity by paying the mortgage debt, to avoid being disturbed.

Where plaintiff, having prayed for an order of seizure and sale against certain property and notified defendant as executor of the mortgagor, subsequently changes he proceedings to those via ordinaria, and, representing that defendant is in possession of the mortgaged property, prays that he may be cited and for a judgment against him for the amount of the debt, and in case of his failure to pay, ordering the property to be sold, the judgment should direct the mortgaged property to be sold, unless the defendant pay the mortgage debt. The defendant being cited in the proceedings via ordinaria, merely as the actual possessor of the mortgaged premises, no judgment can be rendered against him as executor.

APPEAL from the Parish Court of New Orleans, Maurian, J. Denis and Pitot, for the plaintiffs. The privilege conferred on the Citizens Bank of procuring the seizure and sale of property mortgaged to it, though it have passed into the possession of third persons, in the same manner as if still in possession of the original mortgagor, may be claimed whether the Bank proceed via executiva or via ordinaria. See sect. 24 of the charter. Croghan v. Conrad, 11 Mart. 556. Richard v. Bird, 4 La. 307. Curia Filipica, Executoria, No. 1, § 2. 3 Febrero, 2, § 2, No. 115.

Barthe, for the appellant. The action should have been before the Probate Court. Code of Pract. art. 924, § 13. 2 La. 256. 3 La. 277. 10 La. 219, 589. The words according to law, used in the 24th section of the charter of the Citizens Bank confirm this position.

MARTIN, J. Buisson, the executor of Pichot, is appellant from a judgment which rejects his pretensions to oppose the proceedings of the Bank, tending to the sale of several lots of ground in

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the city of New Orleans, mortgaged in his lifetime by Pichot, a stockholder and debtor of the Bank, Buisson being in possession of the premises.

The claim of the Bank was resisted on the ground that, being a claim for money against the estate of Buisson's testator, it ought to have been prosecuted before the Court of Probates of the parish of Assumption, in which parish Pichot was domiciliated, and in which his succession was opened.

This exception to the jurisdiction of the Parish Court was properly overruled; because the Bank did not seek a judgment against Buisson, as executor of Pichot, but asked only that Buisson, being in possession of the lots mortgaged by Pichot, should either pay the mortgage debt, or suffer the premises to be sold.

On the merits Buisson pleaded the general issue only.

The Parish Court gave judgment for the plaintiffs against Buisson, in his capacity of testamentary executor, for the amount of their claim, to be satisfied by privilege and preference out of proceeds of the sale of 120 shares of the capital stock in the Citizens Bank, and of the mortgaged premises.

The claim of the Bank rests on the 24th section of its charter, which provides, that "all property mortgaged to said corporation for any purpose, may be seized and sold at any time, according to law, in whosesoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession by succession, or descent to heirs or legatees, by last will and testament or otherwise, in the same manner as if the same was in the possession of the original mortgagor."

It is true, that the property mortgaged to the Bank must be sold according to law; but it is also true, that it may be sold notwithstanding any change of possession by succession, and in the same manner as if the same was in the possession of the original mortgagor. Now it is true, that there has been a change of possession by succession, and the premises are no longer in the possession of the mortgagor; but the charter has provided that these circumstances shall not affect the rights of the Bank. An order of seizure and sale was therefore correctly taken, and notice given to the person in possession, with a view of affording him the opportunity either to pay the mortgage debt, and thus avoid

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being disturbed, or to suffer the Bank to sell the premises. The circumstance of the person in possession being the testamentary executor of the mortgagor, could have no influence on the conduct of the Bank, it being an absolutely immaterial one.

The bank next saw fit, for reasons which do not appear, and the examination of which would be useless, to change their proceedings from the via executiva to the via ordinaria, filing a supplemental petition, in which they cite Buisson as the person in possession, and not as the testamentary executor of their deceased debtor, and pray judgment against him for the mortgage debt, or that the mortgaged premises be sold to discharge it.

It was at this period that the plea to the jurisdiction of the court was interposed, and, as has been already said, correctly overruled. The Bank had an undoubted right, like any other mortgage creditor, to substitute proceedings in the via ordinaria to those in the via executiva, to which it had at first resorted; but it had no right to pray for judgment against the testamentary executor in his said capacity, neither did they so, for the words testamentary executor do not appear in any part of the supplemental petition, and the Judge, in our opinion, erred in giving judgment against a defendant, who had been cited merely as the actual possessor of the mortgaged premises, for a sum to be paid by him in his capacity of testamentary executor.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed; and it is ordered and decreed, that unless Frederic Buisson, the person in actual possession of the mortgaged premises, shall pay to the plaintiffs the sum of \$5400, with interest thereon at the rate of ten per cent per annum from the first of April, 1842, until the 11th of April, 1843, and from thence until paid as follows: on \$240, the amount of instalments due, at the rate of ten per cent per year, and on the balance of said sum of \$5400, after deducting the said amount of instalments due, to wit, on the sum of \$5160, at the rate of six and one-half per cent per annum, that the mortgaged premises may be sold to satisfy the claim of the plaintiffs as aforesaid, with costs in the Parish Court; those of the appeal to be borne by the plaintiffs and appellees.

THE POLICE JURY OF THE PARISH OF JEFFERSON v. ALLON D'HEMECOURT and another.

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A police jury has no authority to establish a new road through the lands of an individual without compensating him therefor, unless it be shown that he will derive therefrom something like a commensurate benefit, nor to compel him to make such a road at his own expense. Per Curiam: The acts of the Legislature conferring the powers possessed by police juries in relation to public roads (acts of 25 March, 1813, s. 5; 22 February, 1817, s. 3; 30 January, 1834, ss. 4, 5, &c.) cannot be understood as repealing the articles of the Civil Code relative to the mode of expropriating property, where no other mode of expropriation is pointed out by them. Art. 489, which declares that private property shall not be taken for public use without indemnity, as well as arts. 2604 to 2611, which confirm the same principle and point out the mode of expropriating property when the legislature has not directed otherwise, has a constitutional sanction, and cannot be violated by parochial legislation, nor by that of the State itself.

APPEAL from the District Court of the First District, Buchanan, J.

- F. B. Conrad, and J. Seghers, for the appellants.
- G. Strawbridge and Roselius, for the defendants.

GARLAND, J. This action was commenced to recover from the defendants, the sum of \$3426, with interest at nine per cent per annum, it being the price which the parish had contracted to pay for making a road 114 arpents and six toises in length, over the lands belonging to the defendants, lying on the bayou Des Familles, leading to Barrataria Lake. To this demand the defendant D'Hemecourt answered by a general denial, and an averment, that he had previously instituted a suit against the plaintiffs for damages, for illegally entering upon his land to make the road, and asking for an injunction. He prayed, that that suit might be consolidated with this, and his demands therein be considered as in reconvention, and for a judgment in his favor. McDonogh answered by a denial of the plaintiffs' right to recover, and an averment of a want of right to make the road in question. He further alleged, that all the proceedings in relation to laying out the same were illegal; and that he was in no manner liable for the making or keeping of said road in repair.

The evidence shows, that long before the cession of Louisiana to the United States, a royal road (camino real) existed on the

left or east side of the bayou Des Familles, from its source near the Mississippi River to the Lake Ouacha, or Barrataria, which remained until the month of July 1817; when several proprietors in the district of Barrataria, after a consultation among themselves, agreed for the reasons stated in a private act passed by them, and never recorded so far as the evidence informs us, to change the road from the left or east side of the bayou, to the west or right side, from its source to a point now called Delery's This act was acquiesced in by the parochial authorities, we suppose, but we find no express sanction of it in the record. Those proprietors agreed to make the road themselves. Below the bridge, no change was then proposed, and the road continued on the left side. In the year 1825, the parish of Jefferson was created; and an ordinance of the Police Jury was passed, dividing it into districts, and appointing a syndic for each, who was to have the general superintendence of roads, levées, &c. On the 19th May, 1825, the jury passed an ordinance relative to the Barrataria road, which, it is said, "shall pass on the right side of the bayou called Familles Bayou, and the syndic is authorized to cause all the necessary work to be done, in conformity to the following article. The road shall be cleared for the width of eighty feet, through its whole length, and the branches, and bodies, and shoots of trees cut away. The inhabitants shall not be bound to make ditches on each side of the road, except in the places that shall have been cleared seven years; but as soon as seven years shall have elapsed since the spot shall have been cleared, the syndic shall order the ditches to be made. In every part where there shall be no ditches on both sides of the road, as many traverse ditches shall be made as shall be necessary to drain the low grounds, and the said ditches shall be covered by bridges. The syndic of Barrataria, accompanied as is required by the regulations, shall fix the time within which the works shall be done."

At a subsequent period, another ordinance was passed, declaring that one part of the road should be in the first ward of the parish, and the remainder, extending to bayou Ouacha, or Barrataria, in the seventh ward, and should run upon land sufficiently high not to be overflowed. Other ordinances then fix the width

of roads generally, the length of bridges, and how ditches are to be made, &c. and provide for having them kept in repair, and authorize the syndic, accompanied by two proprietors, to say what work is to be done &c., of which he is to notify the inhabitants; and, if they do not obey his orders, he is to give notice to the Parish Judge, who is authorized to assess a fine, and have the work done by contract. No where in the ordinance do we find any mode fixed by which the property of an individual is to be expropriated, or taken for public use, or compensation to be made for it when so taken. It further appears, that the syndic of the ward, with two inhabitants, went on the lands of the defendants, (who are not residents of the parish,) and designated where the road should run on the right side of the bayou; and then gave a notice calling on them to make a road, at their own expense, a distance of about four miles, for the public use, without any compensation therefor. They did not obey; whereupon the syndic reported them to the Parish Judge, who gave an order to have the road made by contract; and notices for bids were published in the newspapers, and the execution of the work adjudicated to one Delery, for the sum sued for. He was occupied about the work from the 7th of April until the 18th of May, and received A number of witnesses were examined as to the sum claimed. the necessity of changing the road, shortening the distance, and the convenience of the inhabitants, which we do not think it necessary to detail, as our opinion is based upon questions of law arising out of the facts stated. The District Judge gave a judgment against the plaintiffs, and one of nonsuit on D'Hemecourt's demand in reconvention, from which judgment the plaintiffs have appealed.

The plaintiffs claim to exercise the power under which they have acted, by virtue of the authority conferred on Police Juries generally, to make such rules and regulations as may be deemed expedient, as to the proportion and direction, the making and repairing of roads and bridges, and other highways. It is contended, that the whole management of such matters is left to the Police Juries, and that their proceedings are final in the parish of Jefferson. See B. & C.'s Dig. p. 640, § 5; p. 644, § 3; p. 652, §§ 4, 5.

We are not disposed to curtail the Police Juries of any of their

legitimate powers in relation to this subject. On the contrary, we have said, in a recent case, (Cross v. The Police Jury. of Lafourche Interior, ante, p. 121,) that we thought the powers in relation to roads, &c. was very properly confided by the Legislature to the parochial authorities, and that we would not interfere unnecessarily; but when gross injustice has been done, the courts have a right to control them. It is true, the act of 1818 relative to public roads, is not in force in the parish of Jefferson; but that does not, in our opinion, exempt the Police Jury of that parish from judicial restraint, when it attempts to expropriate the property of individuals, without their consent.

Article 489 of the Civil Code, which declares, that private property shall not be taken for public use without indemnity, as well as articles 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, which confirm the same principle, and point out the mode of expropriating property, when the Legislature have not directed otherwise, has a constitutional sanction, and cannot be violated by parochial legislation, or that of the State itself. Every citizen is bound to contribute his proportion to the public good, and property is often subject to servitudes for public benefit; but it cannot be permitted to a Police Jury to take the land or other property of an individual for public use, without compensation, unless it be shown that he derives something like a commensurate benefit. If this cannot be done, with what propriety can it be said that, not only can property be taken without compensation, but a heavy tax be levied without any benefit to the individual being shown?

We do not understand the acts of the Legislature, conferring the powers they have in relation to public roads on the Police Juries, as repealing the articles of the Code relating to the mode of expropriating property unless some other mode is indicated or directed.

The ordinances of the Police Jury are very general and indefinite in relation to the construction of roads, and make no provision at all as to the mode of changing their location. The ordinance of the 10th of May, 1825, is not very clear as to the intention of the jury to change the road from the left to the right side of the bayou below Delery's bridge, and makes no provision for compensating the owners of the land over which the new road

shall pass. We concur in the opinion of the District Judge, that the proceedings of the Police Jury have not been such as to render the defendants liable to pay the sum claimed.

Judgment affirmed.

FERDINAND PERCY and others v. MAUNSEL WHITE and others.

An action by the stockholders against the directors of a bank for damages for losses sustained through their negligence, fraud or mismanagement, is prescribed by ten years from the date of the acts complained of.

Corporators may maintain an action against each other relative to the affairs of the corporation, during its existence.

APPEAL from the District Court of the First District, Watts, J. Barton and A. Hennen, for the appellants.

C. M. Conrad and G. Strawbridge, for the defendants.

GARLAND, J. To understand this case properly, it will be necessary to refer to those of Faurie, &c. v. Millaudon, &c. 3 Mart. N. S. 476, and Percy, &c. v. Millaudon, &c. 8 Mart. N. S. 68. 3 La. 568. After the decision against the defendants, Millaudon, Lanna and Abat in those cases, the plaintiffs, on the 18th of August, 1832, instituted this suit against Maunsel White and various other persons, who had been directors of the Planters Bank of Louisiana, in the years 1817, 1818, 1819, 1820, 1821, 1822, &c. Some of the defendants were directors for a part of the time only, and none for the whole period, excepting Millaudon, Abat and Lanna, whose case has been tried. McCall and Harrod were directors in 1817 only; and several defendants were not directors until 1820, or subsequently.

The allegations in the petition are in substance the same as those in the case against Millaudon, &c. 8 Mart. N. S. 68. 3 La. 568. It is, therefore, not necessary to state them in detail. They charge the defendants with fraud and negligence in the discharge of their duties as directors, whereby the institution was ruined, and the stock lost. Various acts and specifications in different years are stated, as having occasioned the losses and damage; but the petition charges nothing specially after the year Vot. VII.

1821, as having been productive of loss, or as having caused damage to the bank or stockholders. There is a general allegation, that the conduct of the defendants as agents and directors. at divers times between the 1st day of January, 1821, and the 15th day of April, 1826, occasioned losses to the bank and the stockholders, to the amount of \$300,000. The prayer is, that certain persons may be made parties besides those charged as directors, and that the directors of the different years may be condemned to pay damages for their misconduct and negligence in each year, at the rate of \$300,000 per annum. It is further asked, in case a decree be rendered against the directors who are charged, that out of the sum recovered the plaintiffs be decreed to receive \$200 on each share of their stock as a dividend, and that the surplus be brought into court to be distributed in such manner as may seem just; and that a general and final settlement of the affairs of the bank may be had.

The various answers to this petition are pleas of res judicata, the general issue, various exceptions to the capacity of the parties to stand in judgment, and prescription. After a protracted trial in the inferior court, the jury gave a general verdict in favor of the defendants, and the plaintiffs have appealed.

The cause has been argued in this court at great length, and we have taken time for full consultation and reflection, before coming to a conclusion.

It is to be observed that, as to the parties sued as directors, this is essentially an action for damages against certain directors for negligence, fraud and mismanagement, as the agents of the bank and of the plaintiffs as stockholders. They are charged as wrongdoers and unfaithful agents, and the damages are asked for, as an indemnity to those who have been injured. The charter of the bank expired in 1826. It is shown, if not admitted, that the concern is totally insolvent; and that, if nothing can be recovered in this action, there will be nothing to divide between the stockholders. So far as the record shows, the debts of the institution have been paid, and this controversy is entirely between the stockholders; so that the action is to compel the agents of the bank to indemnify their principals for losses sustained and gains expected to be made. As between the parties before us, this is

an action of damages ex contractu against mandataries. Taking it in that point of view, the defendants aver that it is prescribed, as no act is charged specifically after the year 1921 as having been injurious to the bank or the stockolders, and none is shown by the testimony, under the general allegation. subsequent to that year. In 3 La. 593, this court said, that the ruin of the bank was owing to the mismanagement in the years 1817, 1818 and 1819. In the year 1820 there were acts which, it is probable, would render the defendants liable; but subsequently to 1821, we cannot say that any act was committed by the directors, derogating from their duties as faithful mandataries. The injury was inflicted previously, and the consequences only developed themselves afterwards. Subsequently to 1821, but few of those who had brought ruin on the bank were in the direction and they cannot be made responsible for what they could not This being the fact, we cannot see how the plaintiffs can avoid the plea of prescription, the suit having been brought more than ten years subsequent to any act which proved injurious to the interests of the stockholders.

The plaintiffs contend, that the prescription did not commence to run against them until the expiration of the charter of the bank in April, 1826, as they were all partners in the same concern, and no action could be maintained against the defendants while the bank was in existence; and they rely upon the decision of this court, in 3 Mart. N. S. 476. That case assimilates a corporation to a partnership, and as a consequence, it was held, that the corporators could not maintain any action against each other relative to the affairs and management of the corporate concerns. during its existence. We have re-examined the doctrine laid down in that case, and think it has been carried too far. consists, as we think, in assimilating things to each other, which are very different. The law makes a wide distinction between a corporation and a partnership. The one is an intellectual, the other is a real being. The responsibilities of partners towards each other, and towards third persons, are widely different from those of corporators towards each other, towards the corporation There is consequently no reason for saying and individuals. they are to sue and be sued in the same manner. Angel & Ames.

in their treatise on Corporations, say, "a corporation is an association quite distinct from a partnership;" (p. 23;) and they proceed to point out the difference. The Civil Code of 1808 in the title on corporations, recognizes marked distinctions, and points them out in distinct terms. The present Civil Code is equally explicit, arts. 426, 427, 428; and see generally the titles which treat of corporations and partnership. The principles stated in the case in 3 Mart. N. S. 476, are correct in themselves, but we think they are not applicable to corporators. A corporation may sue one of its members, and he can sue it in turn. Contracts made between them are valid and can be enforced. The property belonging to a corporation cannot be controlled by an individual member; but it is different with his stock. That he can control. He can sell it, give it away, and dispose of it as he His interest in it is distinct from that of the corporation, and the law gives him an action for the purpose of protecting it; which action he must exercise within the time prescribed by law. In 3 La. 585 this court said, "directors of a bank have important duties to perform to its creditors and customers, the public and stockholders." Competent and convenient means must therefore exist to compel them to perform those duties. stockholder has a right to the preservation of his stock, and it cannot be possible that he is bound to wait until the dissolution of the corporation before he is entitled to exercise his right. cannot be, that a stockholder must stand by for years and see the affairs of a corporation mismanaged, it ruined, and his stock lost, without a remedy. If the doctrine contended for be true, it would in many instances be equivalent to a denial of justice, as many of our corporations have nearly or quite half a century to exist, and one or more are perpetual.

The unfaithful agents of a corporation would most effectually be protected from responsibility, if they could not be sued until the expiration of the charter of the corporation which they have ruined or greatly injured. By the charter of several of our banks, it is not necessary that the directors of the branches shall be stockholders at all; and we suppose it will not be contended, that they are not suable before the expiration of the charter, for tortious acts, by which the capital of the branch may be entirely

lost. Would it not then be strange, if another director, equally culpable, should be protected, simply because he should own a few shares of the stock?

If the directors of banks abuse the authority and trust reposed in them, and thereby injure the corporation as a body, it can make them responsible for it, and the amount recovered of them goes into the common fund. An action to recover such damages must be brought within the time prescribed by law. We also think, that if the directors of a bank or other corporation, having the control, so manage its affairs as to benefit themselves and injure the stockholders, they are liable in damages; and, being so liable as individuals, they are entitled to have actions instituted against them, instituted within the time prescribed. If it were otherwise, the majority of the stockholders might sacrifice the interests of the minority, and there would be no remedy until such time as one would be useless. Suppose the directors of one of our banks to control a majority of the stock, and thus keep themselves in power, and so dispose of the funds as to render the stock of no value to any person but themselves; would it not be considered almost preposterous to say that the ruined and despoiled stockholder must wait fifty years before a suit could be brought to redress the injury? Our reports are full of cases in which stockholders have sued the corporations in which they were interested, and in turn been sued by them.

But to return to the real character of this action, it is one for damages against individuals, for injuries alleged to have been committed whilst acting as the agents of the plaintiffs; and we are of opinion that it is prescribed.

Judgment assirmed.

Dumas, Executor, v. Guesnon, Syndic.

JOSEPH DUMAS, Dative Testamentary Executor of Antoine Carraby, deceased, v. Philippe Guesnon, Syndic of his own Creditors.

Mortgages acquired by third persons under the faith and protection of a decree of a court of competent jurisdiction which has never been annulled, ordering the erasure of a mortgage, must have their full effect.

APPEAL from the Court of Probates of New Orleans, Bermudez, J.

D. Seghers, for the appellant, cited Marchand v. Gracie, 2 La. 147. Millaudon, v. Cajus, 6 La. 222.

Hoa, for the defendant.

Simon, J. The facts which gave rise to this controversy are fully stated in the opinion lately delivered in the case of *Guesnon* v. *His Creditors*, ante, p. 382.

This suit was instituted for the purpose of obtaining from the court which had rendered it, the cancelling of a judgment rendered by the court, a qua, ordering that a certain judicial mortgage recorded against the defendant Guesnon, syndic of his own insolvent estate, should be erased from the books kept by the Recorder of Mortgages, for certain reasons adduced in the plaintiff's petition. The defendant filed several exceptions, to wit: 1st. That the Court of Probates has no jurisdiction in this case ratione materiæ et personæ, because the syndic, having filed his tableau of distribution before the District Court, and being only accountable before that court, which is seized exclusively of all the matters connected with the settlement of the insolvent estate. this suit should have been brought before said District Court. 2d. That the same matters are, by way of opposition to the said tableau, pending before the District Court. 3d. The plea of res iudicata, in consequence of the judgment rendered by the District Court on the same question arising in the present case. The record of the suit of Guesnon v. His Creditors, was produced in evidence in this cause.

The Judge, a quo, sustained the exception rei judicatæ, and dismissed the plaintiff's petition; and from this judgment the plaintiff has appealed.

Dumas, Executor, v. Guesnon, Syndic.

This action is now without any object, in consequence of our decision lately rendered in the case of Guesnon v. His Creditors, in which (the effect of the judgment here sought to be annulled, being the subject matter in controversy between the plaintiff in this suit and those of Guesnon's creditors, who had acquired mortgage rights against his property subsequently to the judgment complained of,) we held, in accordance with the previous and uniform jurisprudence of this court, that a person who has acquired rights under the faith of proceedings apparently sanctioned, or by virtue of a judgment rendered by a court of competent jurisdiction, cannot be affected by the result of a suit by which those proceedings or judgment are sought to be annulled. said, on the authority of the case of Lessassier v. Dashiel, 17 La. 203, that mortgages acquired by third persons under the faith and protection of a decree of a court of competent jurisdiction, which had not then been annulled or in any manner attacked, should have their full effect, and should be satisfied in preference to the mortgage previously and perhaps illegally cancelled; and we recognized the doctrine, so often relied on in matters in which minors are interested, "that whatever may be the result of a suit, by which a minor, on ariving at the age of majority, seeks to annul an order or proceeding under which his general mortgage was raised, it cannot affect the rights of third persons who purchased under the faith of such proceedings, apparently sanctioned by the Court of Probates," as applicable to the question then at issue.

In consequence of our decision, it appears to us, that there is no further necessity for examining and expressing any opinion on the questions presented by the pleadings; that even were we to cancel the decree complained of, our judgment could not in any manner relieve the plaintiff, and would be void and nugatory; and that justice does not require in this case any other judgment at our hands, than one dismissing the plaintiff's appeal.

Appeal dismissed.

Cunningham v. Caldwell.

PETER CUNNINGHAM v. LUCY ANN CALDWELL.

In an action on a written lease defendant may introduce parol evidence to show that plaintiff had consented, prior to the expiration of the lease, that a third person should occupy the premises as his tenant. Per Curiam: The testimony does not contradict the written lease, but only shows a subsequent agreement in relation to it.

APPEAL from the Parish Court of New Orleans, Maurian, J. Mitchell, for the appellant.

A. Hennen, for the defendant.

Morphy, J. The petitioner represents, that on the 11th of September, 1838, he leased a house to the defendant by authentic act, for two years from that date, at the rate of \$2000 per annum payable monthly, the lessee reserving the privilege of renewing the lease for two years longer at the rate of \$23.0 per annum; that the defendant having continued in the enjoyment of the premises after the expiration of the two first years, paid for the four or five months next following at the said rate of \$2300 per annum, when at her request he was induced to diminish the rent to \$2100, which amount has been paid, to wit, \$135 per month in cash, and the balance of \$40 per month in the rent of a house of the defendant, occupied by him; (the petitioner;) that she continued so to make the payments up to the 11th of June, 1842, at or about which period the defendant abandoned the premises, leaving them much injured and damaged, and many things broken or destroyed through her fault, which were in good order when she entered the house; and that she has since refused to pay any rent, or to repair the damage done to the property. He claims for the rent due since the 11th of June, 1842, and the expenses he has been put to in repairing the house, the sum of \$1141 31. The answer admits the execution of the lease for two years from the 11th of September, 1838; but avers, that before its expiration the petitioner consented to let one John C. Smith take, use, and occupy the house, in the place and stead of the defendant; that Smith continued to occupy the same, with his consent and approbation, until about the month of June or July, 1842; that the defendant notified the petitioner, that she

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would not renew the lease, but that the same would be at an end after the two first years for which the house was originally taken; and that the said Smith was to be the tenant thereof. The answer admits, that Peter Cunningham does occupy a house of the defendant's at the rate of \$40 per month, which rent has not been paid since the 9th of June, 1842; denies his right to retain any part of it; and claims the same in reconvention up to the 9th November, 1842. The case was submitted to a jury, who found in favor of the defendant and plaintiff in reconvention. After an unsuccessful attempt to obtain a new trial, the petitioner has appealed.

This case turns principally upon questions of fact, the solution of which is not so clearly erroneous as to justify our interference. There are, however, two bills of exceptions in the record, which we are probably expected to notice, although the case has been submitted by the appellant without argument.

Several witnesses were offered on the trial to show, that prior to the expiration of the defendant's lease, to wit, during the year 1839, the plaintiff had consented to John C. Smith's going into and occupying the house as a tenant. Their testimony was objected to as going to show, by parol, a different contract from the written lease, which was to last at least two years. The Judge, in our opinion, did not err in admitting the testimony. It does not contradict the written contract entered into on the 11th of September, 1838, but only shows a subsequent fact or agreement in relation to it. The evidence, besides, is altogether immaterial, so far as the lease itself is concerned, because the present difficulty arises with regard to matters which occurred long after it had expired. It is important only to show, that when at the end of two years, the defendant notified the plaintiff that she would not renew the lease, he knew that Smith was the person who then occupied and continued to occupy the house. The Judge also correctly excluded the plaintiff's own affidavit, by which he offered to prove that he had given receipts in the name of the defendant, and orders upon her for all the rent which accrued since the expiration of the lease, and up to the time when the house was abandoned. It is clear that the plaintiff could not give evidence in his own cause. The orders

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drawn by the plaintiff on the defendant and paid by one Shelter, who was acting as her clerk, are not satisfactorily explained by the evidence. It appears, that after the expiration of the lease, Smith, in consequence of some arrangement with the plaintiff, the motive or exact nature of which is not shown, paid his rent to Shelter, who settled with the plaintiff, after retaining and paying over to the defendant forty dollars for the rent of her house. The evidence, however, shows abundantly, that the plaintiff knew that Smith occupied his house, and that he considered and treated him as his tenant. Before purchasing the fixtures of the barroom kept by the defendant, Smith procured plaintiff's consent that he should occupy the house. Upon Smith's application to him, he agreed to pay one-half of the expenses incurred for the introduction of water-works into the premises, to be deducted from the rent, which he reduced in 1840. He sometimes received from Smith advances on his rent, which he allowed in his settlements with defendant's agent; and when Smith left in June, 1842, he expressed his regret at losing so good a tenant, and offered to lease his house to another person, without ever pretending, as he does now, that the defendant was yet his tenant, and was bound to keep the house until the 11th of September, 1842.

Judgment affirmed.

HORATIO W. HILLS and another v. PIERRE HUCHET KERNION and others.

To reclaim money paid on the ground that it was not due, plaintiff must show not only that it was not due, but that it was paid through error, and that he was under no natural obligation to make such payment. C. C. 1752, 2279, 2280, 2281. C. P. 18.

Plaintiffs, factors for the sale of tobacco, having paid defendents, tobacco-inspectors appointed by the State, a certain sum beyond the fees allowed by law, for every hogshead of tobacco inspected by them, reclaimed the amount alleging that it had been illegally extorted by defendants, who had refused to do their duty unless it was paid. It was proved that defendants had given public notice, of their willingness, as individuals, to render certain services not prescribed by law, when requested by the parties interested, on receiving an additional compen-

sation for each hogshead; that plaintiffs knew, when they consented to pay such extra-charge, that it exceeded the amount allowed by law, and was for service which defendants were not required to render as inspectors; that this extra-charge was but a fair remuneration for the additional services, which were beneficial to all interested in the tobacco; and that plaintiffs had always charged this extra-compensation to the owners of the tobacco by whom the amount had been paid. There was no proof that the inspectors had ever refused to do their duty unless the extra-charge was paid. Held, that equity forbidding that plaintiffs should profit by the labor of the defendants without a fair remuneration, and the consideration for which the extra-compensation was paid not being immoral nor unjust, there was a natural obligation on the part of the plaintiffs to pay, and that no action will lie to recover back the amount. C. C. 1750, 1751, 1752, 2279, 2280, 2281. C. P. 18.

Appeal from the District Court of the First District, Buchanan, J.

H. H. and G. Strawbridge, for the plaintiffs.

R. R. Chinn, Canon, Hoa, and Roselius, for the appellants. Simon, J. The plaintiffs seek to recover the sum of \$4756 40. which they allege, has been illegally claimed and received from them by the defendants, who were inspectors of tobacco, over and above the fees fixed by law, during the period mentioned in the account annexed to their petition, beginning on the 4th of April, 1840, and ending 13th of May, 1842. They state that, being in the habit of receiving large quantities of tobacco, the same was inspected by the defendants; that the fees fixed by law for the inspection, sampling, &c., are sixty cents per hogshead, but that the inspectors have illegally claimed the sum of one dollar per hogshead, refusing to do their duty unless this was paid them; with which demand they, the plaintiffs, to avoid the delay and injury which would have resulted from resistance thereto, have been necessitated to submit, until the sum so extorted has amounted to that by them claimed, as shown by the detailed account filed with their petition.

The defendants first pleaded the general issue; but they subsequently obtained leave to file a supplemental answer, in which, by way of peremptory exception founded on law, they aver that there is no cause of action alleged in plaintiffs' petition. They also pleaded the prescription of one year against the plaintiffs' demand.

The Judge, a quo, was of opinion that the plaintiffs were

entitled to recover, and gave a judgment in their favor for the sum of \$4636; and the defendants, after a vain attempt to obtain a new trial, took this appeal.

The office of inspectors of tobacco in hogsheads and in casks, was created by an act of the Legislature of the 20th of March, 1816, (Bullard & Curry's Digest, 508,) by which it was provided, that no owner of tobacco should offer the same for sale, until it was inspected in the manner therein directed, under the penalty of \$50. The act further provides, that notice should be given to the inspectors that the same might be inspected, and that they should be entitled to recover one dollar for every hogshead or cask: and by the 4th section it is provided, that each hogshead or cask of tobacco shall be branded by the inspectors thereof "first quality," "second quality," or "third quality," as the case may be; and any cask of tobacco which shall not be found worthy of being branded, shall be rejected as unmerchantable; and the casks that shall have been branded as above mentioned shall be sold as bearing the quality thereon described; and when any tobacco shall be rejected as aforesaid, the proprietor thereof shall be at liberty to separate the good from the bad, but if he refuses or neglects to do so within one month of such rejection, the inspector shall, at the cost of the owner, cause the tobacco to be picked and separated and branded, so much thereof as shall be found merchantable; and the inspectors shall cause the tobacco which shall be judged by them unfit to pass, to be burnt.

By the second section of an act of 1818, supplementary to the act of 1816, it is made the duty of each and every inspector of tobacco, when a hogshead or cask is opened for inspection, to examine the same carefully, in at least three different places, before pronouncing on the quality of the same, and in no case shall the brand be affixed until at least two inspectors have agreed on the quality thereof; and for each and every hogshead or cask thus examined, the inspectors inspecting the same, shall be authorized to demand and receive fifty cents and no more; and it shall further be the duty of the inspectors to cause the hogsheads or casks to be well closed and coopered, so as to render the same perfectly secure and safe, for which they may demand and receive 75 cents in addition to the price of inspection.

By the first section of the law of 1819 (B. & C.'s Digest, 510,) amending the two previous acts, it is provided: "that it shall henceforth be the duty of each and every inspector of tobacco, when a hogshead or cask is opened for inspection, to examine the same carefully in at least three different places, before pronouncing on the quality of the same; and in no case shall the brand or mark be affixed until at least two inspectors, one of whom shall always be taken among the last appointed, have agree on the quality of the tobacco, which quality shall be mentioned in a certificate signed and delivered by the said inspectors, and for each and every hogshead and cask thus examined, the inspectors inspecting the same, shall be allowed to demand and receive sixty cents, and no more.

It results, therefore, from the different provisions contained in the above three legislative acts, that the duties of the tobacco inspectors consist: 1. In examining the tobacco carefully in at least three different places, after the hogshead or cask is opened for inspection; 2d, in at least two of them pronouncing upon the quality thereof, and agreeing upon such quality before affixing the brand on the hogsheads or casks inspected; 3d, in branding the casks "first quality," " second quality," or "third quality," as the case may be, unless found unmerchantable, in which last case, the tobacco is to be by them rejected as such; and 4th, in giving a certificate, in which the quality of the tobacco so inspected is to be mentioned. For all which services they are entitled to demand and receive sixty cents and no more, for each and every hogshead or cask thus examined. In case further services are rendered, to wit, for causing the rejected tobacco to be picked and separated and branded, so much thereof as shall be found merchantable, and the unfit part thereof to be burnt, they are to be at the cost of the owners; and for causing the hogsheads or casks to be well closed and coopered, so as to render them perfectly secure and safe, they are entitled to demand and receive seventy-five cents per hogshead, in addition to the sixty cents allowed by law as the price of inspection.

The evidence shows, that on the 14th of March, 1836, the defendants, who were then inspectors of tobacco, and who, until lately, have continued to act as such, published a certain notice

addressed to dealers in tobacco, proposing to furnish in future certificates of inspection agreeable to law, as also to furnish, ex officio, samples to those who may desire them, at a charge of 40 cents each; further specifying in said notice, that where samples are furnished, the label thereof will exhibit any objections to the nogshead of tobacco which the inspector may have, such as additional tare of the cask, rates of damages, condition, or extraordinary dimensions, as the case may be. On the 21st of the same month, certain resolutions adopted by a large meeting of the dealers in tobacco were published in the Bulletin newspaper, apprising the public that for certain reasons therein specified, said dealers in tobacco had, in addition to the duties imposed by law on the inspectors, determined that they should, ex officio, render such further services in the execution of their said duties, as are specified in the said resolutions, (in substance the same as are proposed in the first notice,) for which they should receive forty cents per cask, half to be paid by the seller, and the other half by the buyer. On the 15th of the same month, a letter was addressed to the inspectors by a committee appointed by a meeting of the receivers of tobacco held the day before, complaining of the extra-charge for sampling, and transmitting to them the opinion of the then Attorney General of the State, adverse to the inspectors' pretensions. This letter was answered on the same day by the inspectors, informing the committee that they would be at all times ready and willing to inspect all tobacco in the manner (therein specified,) provided for by the inspection laws, for which they would expect a compensation of sixty cents per hogshead; and that as individuals, unconnected with their official duties, if requested, they would draw samples, &c., for which they should expect as compensation for such services, forty cents for each hogshead.

It further appears from the testimony of several witnesses examined on the trial by plaintiffs, that previous to 1836, the inspectors furnished the samples without any additional charge; that in 1836, the buyers complained of the loss they sustained in the tare, &c., and it was agreed, on both sides, that the inspectors should receive 40 cents additional compensation for sampling, labelling, &c. By the adoption of these regulations,

the tobacco trade has been put on a better footing than it ever was before; it has better secured the interest of the buyer and seller, and facilitated the operations of the trade. These regulations, agreed on at that time, have constituted the usage and mode of trade until now, and the defendants, since 1836, have performed the duties enjoined upon them by the meeting. Since then, the factor has been in the habit of charging the planter with the whole charge, but on effecting the sale, debiting the buyer with one-half. The forty cents have been paid without complaint on the part of any one; and it is generally understood, that it is altogether by the samples that tobacco is bought and sold.

It is also shown by the testimony of witnesses examined by the defendants, that it was agreed that the charge of forty cents should be paid, in order that the certificate should express the tare of the tobacco, and its defects and qualities. Previous to 1836, this was not done, and the damaged tobacco has been classed since that time. At the time of the meeting there was a good deal of necessity for it, because the inspectors would not give any samples at all. The payment of forty cents has tended to better the trade, and has given confidence to the certificates of the samples. No one ever complained of the charge, nor were any persons ever vexed or harrassed by the inspectors. commission merchants, buyers and planters have been benefitted by the imposition of the charge of forty cents. The witnesses consider it a kind of compromise between the factor, seller, purchaser and inspector, that the charge should be made; the general opinion in 1836, being, that there was nothing in the law to protect the dealers, the charge was allowed as extra-official. witnesses all agree, that the regulations of 1836 have tended to make the tobacco stand higher than it previously did, and have been carried out with good faith. They consider the compensation of forty cents as reasonable, and one of them says that, as a buyer, he always paid his half very cheerfully. They think the proceedings of the meeting of 1836 have met the concurrence and approbation of factors, planters, and others in the trade.

It is evident from the facts above established, that although

there is no positive proof of the resolutions of the meeting having ever come to the knowledge of the plaintiffs, and of the latter having ever given their express concurrence thereto, they submitted for a long space of time to the charge of forty cents, to which they now give the epithet of extortion, without urging any complaint against it. An immense quantity of tobacco was inspected, at their request, as factors; and there is no proof that, as they allege, they were necessitated to submit to the charge, to avoid the delay and injury which would have resulted from resistance thereto, or that the inspectors ever refused to do their duty unless said charge was paid. the contrary, we find in the letter of the inspectors to the committee, which letter was produced in evidence by the plaintiffs. that the inspectors proposed to make two distinct charges, viz.: one of 60 cents per cask for the inspection of tobacco in the manner provided for by law, and another of forty cents per hogshead for the extra services to be by them rendered as individuals, for sampling, labelling, &c. if requested. Now, it is also shown by the testimony of William Gray, that he has sent a good deal of tobacco of his own and of others to the plaintiffs, since 1836, and that in the account of sales rendered to him, the plaintiffs have charged him with the fees of inspection and sampling. Witness has never requested them to sue for and recover back the fees, and they never told him that they intended refunding him the twenty cents. Does not this fact show that the plaintiffs, in their dealings with the inspectors, always considered the charge as a fair one, and that it was at least a just remuneration for the services by them rendered extra-officially? They have not established a single instance of any objection on their part to pay the charge; on the contrary, their books show that the planters and purchasers were regularly debited according to the regulations; and the receipts of the inspectors also show, that the forty cents complained of were uniformly paid as an extracharge, distinct from the charge made under the inspection laws.

This action is based upon art. 2279 of the Civil Code, which declares that, "he who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it;" and upon

art. 2280 which provides, that "he who has paid through mistake, believing himself to be a debtor, may reclaim what he has paid." But by the terms of art. 2281, and of art. 18 of the Code of Practice, it is provided, that "he who pays through error what he does not owe, has an action for the repetition of what he has thus paid, unless there was a natural obligation to make such payment: but it must be proved that he paid through error, otherwise it shall be presumed that he intended to give." Thus, it is clear, that in order to sustain an action of this kind it is necessary to show, not only that the sum paid was not due, but that it was so paid through error; and yet if the payment was thus made as the consequence of a natural obligation, no recovery can be had. Toullier, 11, No. 87, says: "La répétition doit donc cesser dans tous les cas où il éxiste une cause de payement raisonable et vraisemblable, quand même la chose payée ne seroit pas due dans le sens légal et rigoureux du mot, suivant lequel une chose n'est due que lorsqu'on a une action civile pour l'exiger:" "Debitor intelligitur is a quo invito exigi pecunia potest." L. 108, V. S. 6 Toullier, 386. Pothier, Oblig. No. 195. See also Pandectes Françaises 10, p. 377, on art, 1376 of the Nap. Code, corresponding with our art. 2278, in which the commentator says: "Pour qu'il y ait lieu à la repe tition, il faut que celui qui a payé ignore qu'il ne doit point, car celui qui paye sciemment ce qu'il ne doit pas, ne peut pas répéter, quand même en payant il auroit eu l'intention de réclamer ensuite." This doctrine is founded upon the Roman laws. L. 1., § 1 De Condictione Indebiti. " Sed si sciens se non debere solvit, cessat repetitio;" and L. 50 De Solutionibus.

It cannot be controverted, that it is unlawful for a man to contract for or receive usurious or compound interest; but yet if it be paid, the law gives no action to recover it back. 2 La. 428. It is a compliance with a natural obligation which, under the definition given in art. 1750 of the Civil Code, "is one which cannot be enforced by an action, but which is binding on the party who makes it, in conscience, and according to natural justice." A natural obligation is also one which the law renders invalid for the want of certain forms, or for some reason of general policy, but which is not in itself immoral or unjust. Civ.

Code, art. 1751. And no suit will lie to recover back what has been paid or given in compliance with a natural obligation. Ibid., art. 1752.

Now, for a proper application of the legal principles above recognized, let us put the case in the position most favorable, under the evidence, to the plaintiffs' pretensions; and let us suppose, although we are not prepared to express any opinion on this point, that it was unlawful for the defendants to receive the extracompensation complained of, and that, therefore, in the words of the law, they have received what they were not entitled to, and two questions will present themselves:

1st. Did the plaintiffs pay the amount sued for through error?

2d. Were they not bound under a moral or natural obligation, to compensate the defendants for their extra-services?

I. We have already demonstrated, that the plaintiffs well knew the extent of the services which, under the inspection laws, they had a right to require of the defendants, as also the limit of the charge, which, under those laws, the defendants were entitled to make as a compensation for such services. When they employed the defendants to sample and label the tobacco, and to fulfil the other duties imposed by the regulations of 1836, the plaintiffs were aware that these were not included among those pointed out by the inspection laws, and that the extra-charge, which they consented to pay, was beyond the limit of the fees allowed by said laws. They submitted to this charge for a certain number of years without complaint, and have always regularly charged it on their books to the account of the owners and buyers, for whom and with whom this kind of business was by them transacted; nay, we must believe that they have been uniformly reimbursed, and that they never paid any thing out of their own money. Can they now say that they paid through error? Can they pretend that they paid with the idea and under the belief. that the charge was warranted by law, or, in other words, that the services were rendered and the charge made according to law? Certainly not. They were at liberty to require and use the inspectors' services in the manner pointed out by law. they have never thought proper to do; and it is obvious that when they called upon the defendants to extend their services

beyond those specified in the law, they did so knowingly, and that they must necessarily have known that the charge to be made was also beyond that allowed by law. Again, in the words of the Roman law: Si sciens se non debere solvit, cessat repetitio.

II. It seems to us, under all the circumstances of the case, that it is manifest that this is an attempt to deprive the defendants of the value of services by them rendered, from which, it must be acknowledged, the plaintiffs have been greatly benefitted. may be true that, from the terms of the inspection laws, the inspectors were entitled to demand and receive sixty cents, and no more, and that whatever be the extent and importance of their extra-services as inspectors, they could not demand any compensation beyond the amount fixed by law. But, on the other hand, is it not equally true that they were not bound, as inspectors, to furnish their services beyond the specifications of the law? Are not their duties well defined and pointed out, in the several acts of the Legislature on this subject? And do those laws contain any provisions by which the inspectors could be compelled to sample and label the tobacco, and to fulfil any of the duties imposed upon them by the regulations adopted by the meeting of the tobacco dealers in 1836, for which they were to be allowed an extra-reward of 40 cents? Surely not. As we have already remarked, it is not shown that the plaintiffs ever made any objection to the defendants inspecting their tobacco in the manner pointed out by the regulations; this, on the contrary, has been the uniform course pursued in all their dealings with the inspectors, and we are convinced, under the evidence, that that course has had the effect of better securing the interest of the dealers. and of facilitating the operations of the trade. The plaintiffs were factors of tobacco, and they and those for whom they acted. had a very extensive interest in this branch of our trade. it is clear, that the services rendered by the defendants were greatly beneficial to the plaintiffs; and if so, as equity forbids that they should profit by the labor of others without a fair remuneration, we are of opinion that the prohibition to demand more than sixty cents, being merely founded upon motives of public policy, and not upon any degree of immorality, and being

simply malum prohibitum and not malum in se, the plaintiffs, by paying to the defendants an extra-charge of forty cents per hogshead of tobacco for their extra-services, have complied with an obligation which they were bound to discharge in foro conscientiæ. It was on their part, a natural obligation.

Under this view of the case, we think it unnecessary to examine the question raised by the pleadings, in relation to the plaintiffs' right of action, and the plea of prescription.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed; and that ours be in favor of the defendants, with costs in both courts.*

* G. Strawbridge, for a re-hearing. The court err in stating this to be an action to recover money paid in error. No such question was raised by the pleadings or argument. The petition alleges, "that defendants illegally claimed the amount received by them, refusing to do their duty unless it was paid, and that plaintiffs, to avoid the delay and injury which would have resulted therefrom, did pay, &c." The charge is, that the money was extorted under color of defendants' office. The principles quoted from the Code and the Pandects are applicable to the rights of individuals in their private dealings-not to the rights and duties of public officers. Taxes improperly assessed may be recovered back, even where voluntarily paid. 17 Mass. 461. 4 Pick. 365. 12 Ib. 17. So where a collector refuses a clearance until tonnage or light money is paid (9 Johns. 201); or where a clerk refuses to issue an order for the release of a vessel under seizure, until his fees are paid. 9 Johns. 370. See also Cantzler v. Gordon, 6 La. 258. So in all cases where money is obtained by extortion or oppression, or by taking undue advantage of a party's situation, an action will lie to recover it back. 1 Wend. 360. 13 Serg. & Rawle, 258.

But it is stated in the opinion of the court, that the payment was voluntary—that the services were extra—that the public has been better served—and that there was a moral and natural obligation to pay. It is denied that the payment was voluntary. The services for which the additional compensation was charged were such only as had been performed, under the same laws by all previous inspectors, and by the defendants themselves, from their appointment, until 1836. Such is shown to be the usage in other cities. The contemporaneous construction of the law, and the usage grown up with the business in this city show, that such services are a part of the duty of inspection. See the section of the Code which treats " of the obligation to perform, as incidents to a contract, all that is required by equity, usage, or law." Again; much stress is laid on the fact, that the public has been better served since the extra-allowance has been paid. But surely it is not pretended that, where a charge is not authorized by law, an officer may exact it provided he be more attentive to his duties. That there was not a natural, but a legal obligation to pay the fees established by law is plain; it is equally clear that there was no obligation,

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HORATIO W. HILLS and others v. PIERRE HUCHET KERNION and others.

APPEAL from the District Court of the First District, Buchanan, J.

Simon, J. The object of the present action is exactly the same as that of the case of Hills & Sinnott against the same defendants, just decided; and is for the recovery of the sum of \$4513 60, an amount paid by the plaintiffs, (one of whom is also a party to the other suit,) to the defendants, from the 15th of April, 1836, to the 11th of September, 1837, under the same circumstances as those described in the case of Hills & Sinnott. It must, therefore, be governed by the same principles of law; from which we have come to the conclusion, that the judgment appealed from is erroneous, and should have been rendered in favor of the defendants.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that ours be in favor of the defendants, with costs in both courts.

H. H. and G. Strawbridge, for the plaintiffs.

R. H. Chinn, Hoa, Roselius and Canon, for the appellants.

LARKIN F. Wood and another v. PIERRE HUCHET KERNION and others.

APPEAL form the District Court of the First District, Buchanan, J.

SIMON, J. This is another attempt to recover back from the defendants a sum of money paid to them by the plaintiffs, (one of whom is also a party to the other suit,) on the 20th of April

legal or natural, to pay such charges as the law never authorized. It is not true that all the tobacco on which the extra charge has been paid was received by plaintiffs as factors. Such was the case as to Gray's, and as to the tobacco owned by him the action was discontinued.

Re-hearing refused.

Succession of Hart.

and 21st of June, 1838, under the same circumstances and facts as those detailed in the case of Hills & Sinnot against the same defendants, just decided. Being, therefore, governed by the same rules and principles, we must conclude that the plaintiffs are not entitled to recover, and that the judgment appealed from ought to be reversed.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that ours be for the defendants, with costs in both courts.

H. H. and G. Strawbridge, for the plaintiffs.

R. H. Chinn, Hoa, Roselius and Canon, for the appellants.

Succession of Bernard Hart—Irma Hart, Administratrix, Appellant.

Petition for the removal of an administratrix for failing to comply with the 5th sect. of the stat. of 16 March, 1842, which provides that "whenever the testamentary executor or other administrator of a succession shall suffer ten days to classe after his confirmation or appointment, without having either qualified, or caused an inventory to be at least begun, the Judge shall forthwith and ex efficie appoint a successor." The judgment appointing the administratrix was signed on the 25 September, and on the 6 October she was sworn, and obtained an order for an inventory. On the 11th of October petitioner applied for her removal. Held, that not having qualified before or on the 5th of October, when the ten days expired, the Judge might in his discretion, have afterwards refused to allow her to do so, but that having permitted her to take the oath on the 6th, it was too late afterwards to object that she had not qualified sooner; and that the statute does not require that both the oath should be taken and the inventory begun within the ten days.

APPEAL from the Court of Probates of New Orleans, Bermudez, J.

Marsoudet, for the application.

Greiner, for the appellant.

MARTIN, J. The widow and administratrix of the estate of the deceased, is appellant from a judgment which removes her from the administration, on the application of one of the creditors.

Hart died at the Havana, the 26th of May, 1843. His widow was appointed administratrix on the 20th September, 1843; the

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judgment appointing her was signed on the 25th; she took the oath on the 6th of October, and on the same day she filed a petition and obtained an order for the inventory. On the 11th of October, the petition for her removal was filed.

The application was under the 5th section of an act of the Legislature, passed the 16 March, 1842, (Sess. Acts, p. 302,) which provides that: "Whenever the testamentary executor, or any other administrator of a succession shall suffer ten days to elapse after his confirmation or appointment, without having either qualified or caused an inventory to be at least begun, the Judge shall forthwith and ex officio appoint a successor in office, as if no such officer had been confirmed or appointed."

The inventory was completed on the 20th of October. pears to us that the Judge of Probates erred. The appointment of the administratrix was completed on Monday, the 25th September, and she took the oath on Friday, the 6th of October; so that five days intervened in the last week of September, and five in the first week of October, making ten days between the completion of her appointment and the administration of the oath to her, and her application for and the issuing of the order to make the inventory. On Wednesday, the 11th of October, five days after, the present application for her removal was filed. law has directed that the removal of the administratrix shall be an ex officio act of the Judge. It certainly may be provoked by any party interested, and perhaps even done on the suggestion of any one. The ten days after the appointment did not expire until Thursday, the 5th of October, and on the morning of the following day, the 6th, the Judge might perhaps have refused to permit her to qualify, and have taken measures for the appointment of another person in her stead. He, however, did not do Was he bound to do it? Within the ten days between her appointment and qualification, a Sunday intervened. On that day she could not have taken the oath. The law does not authorize a creditor to demand the removal of an administrator. It is an act which it vests in the Judge. Whenever a Judge acts, ex officio, he has always some discretion to exercise, unless the law positively requires his performance of the act. When one of the creditors applied for her removal, he was perhaps in the

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same situation, as if he had brought a suit in which the defendant had been cited on the 25th of September; and, no answer having been filed on the 5th of October, he would have had a right to take a judgment by default on the 6th. But if this was not done, and the answer was filed, the judgment by default could not be taken on the 7th.

The appellee's counsel urges, that there has been great and unnecessary delay not only in taking the oath, but also in beginning the inventory. The delay complained of occured during the sickliest season of the year, when there is an almost perfect occlusion of most of the courts of justice in the city, and when most of the members of the bar leave it. Notwithstanding this, much time does not seem to have been lost. The administratrix was appointed on the 25th of Septemler, and the inventory was completed on the 20th October; less than one month having elapsed.

The discretion of the Judge would probably have been better exercised in declining to sustain the application of the appellee; for the removal of the administratrix will be attended with probably more delay, than the learned Judge seems to have apprehended. The new appointment must be made, in the same manner as the original. The act requires it. Certain formalities must precede it.

It does not appear to us that the appellant could have proceeded with much more expedition at that period of the year. The delay of part of a day in taking the oath, might have been overlooked under the maxim "de minimis non curat lex." An earlier day than the 20th of October had been appointed by the administratrix for making the inventory, and the record shows that, on the 9th of October, which was the day on which that operation was to take place, the appellant desired that it might be postponed, as she had failed to receive papers from the Havana, which were necessary.

The act of the Legislature does not require that both the oath should be taken, and the inventory begun within ten days after the appointment; the conjunction or is used, which is the disjunctive. The record does not enable us to see the precise time after obtaining the order for making the inventory, when the

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administratrix took measures to have that operation begun. We see only, that on the 9th, two days before the application for her removal, the inventory was to have been made, and was delayed by circumstances not within her control.

It is, therefore, ordered, that the judgment be annulled and reversed, and that the petition of the appellee for the removal of the administratrix, be dismissed with costs in both courts, and that she be reinstated in the administration.

LAUREN PALMER v. H. W. LEE and another.

The certificate of a notary by whom a bill or note has been protested should state the day on which notice was given to the endorser. It is not necessary to mention the date of the letter containing the notice.

Where, after due diligence, a notary is unable to ascertain the residence of an endorser, notice of protest must be put in the nearest post-office to the place at which such protest was made, addressed to him at the place at which the note or bill appears, from its face, to have been drawn. Notice in a letter addressed to the endorser, and left at the domicil of a subsequent endorser is insufficient. Act 13 March, 1827, § 3.

APPEAL from the Commercial Court of New Orleans, Watts, J. Grivot, for the appellant.

Lewis, contra.

MARTIN, J. This is a suit against the maker and endorser of two promissory notes. There was judgment against the first, and a judgment as in case of nonsuit in favor of the second. The plaintiff appealed, the endorser alone being cited.

The certificate of the notary attests that, as to the first note, he put a notice to the endorser and appellee in the post-office, diligent inquiry having been vainly used to discover his residence. This was done on the 23d of December, 1839, the 22d being Sunday, and the note having been protested on the 21st.

As to the second note, the certificate attests that the notary gave notice of the protest to the endorser on the 22d of June, 1839, (the protest having been made the preceding day,) in a letter Vol. VII.

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addressed to him, which he left at the domicil of L. E. Forstall, a subsequent endorser; his diligent efforts to discover the domicil of the appellee having been fruitless.

The counsel for the endorser and appellee has urged, that it does not appear that the notary used proper diligence to discover his client's domicil; that the certificates do not state the dates of the notices to the endorser, and that the notice of the protest of the second note ought to have been put in the post-office.

The testimony shows, that the notary made inquiries for the residence of the endorser, at the Merchants' Exchange, St. Charles Exchange, St. Louis Hotel, at Bishop's and the Verandah. This appears to us sufficient, especially as the Merchants' Exchange and the post-office are under the same roof. The certificates ought certainly to state the day on which the notice was given to the endorser; but nothing requires that it should state the date of the letter which contains that notice. The notice of protest of the second note was improperly given in a letter directed to the endorser, but left at the domicil of Forstall, a subsequent endorser. The letter ought to have been lodged in the post-office. Bul. & Curry's Dig. 43.

The court erred, in our opinion, in giving judgment of non-suit on the second note.

It is, therefore, ordered, that the judgment be annulled and reversed; and that the plaintiff recover from the endorser and appellee the sum of two hundred and twenty dollars and fifty cents, with legal interest from the 21st day of December, 1839, until paid, with costs in both courts; reserving to the plaintiff his right on the second note, if any he has.

Bacchus v. Moreau.

Honoré Bacchus v. Manuel Moreau.

Where it is stipulated in a notarial act of sale that the purchaser may postpone the payment of a note given by him for the price for a certain time after maturity, on paying interest annually in advance, and the obligor states on the face of the note, which was executed at the same time as the act of sale, that he reserves to himself the right to postpone the payment for the stipulated time, the note and the act must be construed together, and be considered as proving a contract that the principal shall not be exigible until the time to which it was agreed that payment might be postponed, on the payment of interest annually; and the failure of the maker to pay the interest due for any year, will not operate as a forfeiture of the right to delay the payment of the principal, no such penalty being expressed, or implied. The holder of the note has only a right of action, at the commencement of each year, for the interest due.

A stipulation in an act of sale that the purchaser may postpone the payment of the principal for a certain time, on paying interest at six per cent annually in advance, is not usurious or illegal.

APPEAL from the District Court of the First District, Buchanan, J.

Michel, for the plaintiff.

Bodin, for the appellant, contended, that the stipulation requiring the interest to be paid in advance was usurious; that it is equivalent to exacting interest upon interest, which is expressly forbidden by art. 1934 of the Civil Code. Such a stipulation cannot be assimilated to the discount of a note. Discount, says Merlin, verbo, Intérêts, § 3, p. 522, is where a debtor pays before the term allowed him by the contract, when he may retain the interest for the term that is to elapse before the maturity of the debt. The stipulation in this case for interest in advance, is very different.

"L'intérêt," says Pardessus, Droit Comm. vol. 2. p. 297, "ne peut être perçu d'avance par le prêteur, par voie de retenue sur la somme comptée à l'emprunteur; parce que, l'intérêt n'étant que le prix de l'usage et en quelque sorte, le fruit civil de l'argent, ne peut être du d'avance;" &c. The authority given by law to banks on the subject of interest, may be considered as an exception to the general law on the subject.

The defendant has not been put in mora. 14 La. 37. 1 Rob. 131. 3 Rob. 403.

Bacchus v. Moreau.

Bullard, J. In this case it appears, that the appellant, Moreau, purchased of Bacchus certain real property for seven thousand dollars, of which five thousand were paid in hand. For the remaining two thousand he gave his note payable at the office of the Parish Judge of the parish of Jefferson, two years after date, with interest at six per cent from maturity, and on the face of the note the obligor says: "I reserve to myself to postpone payment for five years." The payment is secured by mortgage on a part of the property sold; and in the act of saie there is a stipulation to the effect, that if the purchaser shall think proper to postpone the payment of his note for five years from its maturity, he may do so, on paying upon the amount of the note an annual interest of six per cent, payable at the beginning of each year, to the vendor, or any bearer of the note upon his receipt."

The note was protested upon maturity, payment of it having been demanded at the office of the Parish Judge; and thereupon, the plaintiff took out an order of seizure, which was enjoined upon the ground, that the defendant had a right to renew the note according to the stipulation in the act, on the payment of the interest in advance, which he alleges he has always been ready to pay, and which he deposited in court.

The injunction was dissolved, and the defendant appealed.

The record shows, that on the 18th of April, about three weeks after the note fell due, Moreau wrote to Bacchus, that knowing that his note was to fall due on the 27th of the preceding month, he had looked for him in order to pay him the interest upon \$2000, which he owed him.

It appears to us, that the expression on the face of the note, "I reserve to myself to postpone payment for five years," was an acceptance of the offer to do so, on the payment of interest each year in advance. The act itself left to the defendant the option to pay at maturity, or to postpone the payment of the

^{*} The act and note were executed on the same day, and the former paraphed by the notary, to connect it with the act of sale, in which a mortgage was reserved to secure its payment.

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principal sum for several years, on the payment of the interest at the commencement of each year. Having made his election, as expressed on the face of the note, it became an agreement between the parties, that the principal should not be exigible until after five years, on the payment of interest at the commencement of each year. The note and the notarial act being construed together, may well be considered as proving such a contract: and it is tantamount to a note payable five years after date, with the interest payable and exigible each year, at its commencement. The question then is, whether the failure of the maker to pay the second year's interest, operates as a forfeiture of the term, or right to delay payment? We are of opinion that it does not. No such penalty is expressed; and, in our opinion, it is not implied from the nature of the agreement itself. A right of action accrued to the holder of the note to recover each year, at its commencement, the year's interest, independently of the principal. The payment of the interest being secured by mortgage, as well as the principal, an order of seizure and sale might be issued to make the same out of the mortgaged premises.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; and ours is, that the injunction be reinstated, reserving to the appellee the right to take out of court the year's interest deposited, and to proceed for another year's interest, which has since fallen due, and successively as the same may hereafter fall due, if not punctually paid; and it is further ordered, that, the plaintiff pay all the costs, except those incurred before the deposite of the money in court, and that those be paid by the appellant.

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THEODORE BAILLY BLANCHARD, Testamentary Executor of Theodore Nicolet, v. Spencer Glovd and another.

An error as to the date of the judgment appealed from, committed in filing up a blank in an appeal bond signed by a party as the agent of the appellants and in his own name as surety, will not discharge the surety, where the judgment is otherwise sufficiently described. Per Curiam: The object of all written contracts is to express the intention of the parties, and where that clearly appears from the whole tenor of the instrument and the manner in which it was used, it will not be avoided for a clerical error, as to the surety, any more than as to the principal obligor. C. C. 1951. The rule falsa demonstratio non nocet properly applies to such'a case. So much of the description as is false must be rejected, and the instrument have its effect if a sufficient description remain.

APPEAL from the Commercial Court of New Orleans, Watts, J. Waterman, the surety in an appeal bond executed by the defendants, is appellant from a judgment rendered against him on a rule to show cause why he should not be condemned to pay the amount of the original judgment against the defendants. The question presented by this case grows out of a bill of exceptions taken by the appellant to the admission in evidence of a judgment purporting to have been rendered on the 14th of June, 1839, when the bond signed by him shows that he was surety on an appeal from a judgment rendered on the 29th of that month, on the ground of variance. The appellant also excepted to the admission of the testimony of witnesses to show by whom the date of the judgment in the appeal bond had been filled up, on the ground that parol evidence could not be introduced to alter, or explain a written obligation in which there is no ambiguity.

Lockett and Micou, for the plaintiff. The appellant relies upon an error in the bond in stating the date of the payment from which the appeal was taken. There was full evidence that no other judgment existed in favor of the same plaintiff against the same defendant; that it was filed in the proper case, and that the defendants had the benefit o. their appeal. This testimony is admissible. Belot v. Donovan, 1 Rob. 257. Succession of Roboaum, 1 Rob. 258. Singleton v. Smith, 4. La 433. Keys v. Powell, 9 La. 574. Penniman v. Barrymore, 6 Mart. N. S. 494. Palangue v. Guesnon, 15 La. 312.

There is a striking and important difference between the prin-

ciple of decision in the civil and common law courts, with regard to judicial obligations.

The English statute (23 H. 6, c. 9,) first regulating and allowing bail bonds, prescribes the form, and adds an express provision that bonds taken with any other condition, colore officii, or for ease and favor shall be void.

A long course of decisions under this statute having established the invalidity of all bonds departing from the prescribed condition, the courts of common law insensibly adopted as their rule or maxim, that all bonds required by a statute were void if they varied from the forms of the statute, without adverting to the distinction, that under the act of Henry, the penalty of nullity was expressly affixed by the law to such variance, whereas in other acts there was no such provision.

The civil law courts, not trammelled by any similar statutory provisions, and not misled by any false analogies to them, looking only to substance and not form, have adopted a different rule.

The question with them is, for what was the bond intended? Can its object and application be sufficiently ascertained and identified? If so, in whatever manner a person shall appear to have deemed proper to bind himself to another, he shall remain bound. Duchamp v. Nicholson, 2 Mart. N. S. 672. 2 C. R. 775. 3 Mart. 569. Nov. Recop. lib. 10, tit. 1, ley 1. Febrero Ad., part 1, cap. 7, § 5, p. 97 to 105, Nos. 122 to 128. 1 Pothier Oblig. No. 56. Code Nap. art. 1120. 2 La. 47. 16 La. 174.

In *Duchamp* v. *Nicholson*, the action was on an auctioneer's bond which did not pursue the statute, yet it was held good.

In pursuance of this maxim, that in whatever manner a man intends to bind himself, he shall be bound, and especially with regard to judicial stipulations, it has been held that it is not important that the bond should be signed by all the appellants, nor by any one of the appellants. Signature by the surety only has been held sufficient. Richardson v. Terrell, 9 Mart. 34, 35. Doane v. Farrar, 10 Mart. 78, 79. Poydras v. Paten, 5 La. 129. Wells v. Compton, 2 Rob. 187. See the Civ. Code, arts. 1709, 1940, for the rules of interpretation where the words are ambiguous—or where circumstances render it doubtful. Art.

1945, provides that the intention governs; art. 1946, that agreements must be understood so as to have some effect; and art. 1952, that the construction must be against him who has contracted the obligation.

So it has been often determined that signatures to a blank bond will bind. State v. Judge of the First District, 19 La. 179. Wells' Heirs v. Lamothe, 10 La. 411. 9 Mart. 34. 10 Mart. 74.

So it has been decided, that a party was bound by a bond given on an attachment, although at the time, there was no law requiring or authorizing such bond. Lartique v. Baldwin, 5 Mart. 193.

So, also, it has been resolved, that words wanting in such bonds shall be supplied by the court, and fourteen hundred and ten, shall be understood and held to mean 1410 dollars. Pen niman v. Barrymore, 6 Mart. N. S. 494. And this rule was applied to the sureties as well as principals. Ibid. That where any obscurity or doubt is presented by the terms of the bond, they may be interpreted by the order in pursuance of which it was made. Ibid. And that a sequestration bond being dated the 9th, though suit was commenced only on the 10th, is immaterial. Ibid. Thus too it has been adjudged, that clauses improperly added shall be rejected, and any that are omitted shall be supplied. Slocomb et al. v. Robert, 16 La. 174.

It has even been decided, that the surety on a twelve-months' bond cannot be discharged on the ground that the law is unconstitutional. The bond was made after the law; and the court say "volenti non fit injuria." 3 Cond. R. 773.

Courts proceeding according to the common law, hold such bonds void. See Gilbert v. Anthony, 1 Yerger, 69. 6 Gill & Johns. 250. 1 Hill, 267. 2 Brock. 64. 1 Ham. 368. 2 Dev. 379; and the various cases collected in 1 Metcalf & Perkins' Dig. p. 433.

Yet even the courts of common law have been obliged to mitigate the rigor of their principles; and in modern times, where the whole bond is not declared absolutely void by statute, they hold it to be void only as far as it is in conflict with the statute, and good as to the rest. 10 Peters, 343.

But the point which seems decisive is this: the alleged cause

of invalidity is a *mistake*—the *mistake* of the party himself who *profited* by it. A court of chancery would correct that mistake by a decree, and *set* up the *bond* in it true *intended* terms.

If a court of equity would do this, our courts where law and equity are administered together, according to the maxims of natural justice. will do it. 1 Story's Equity, § 115, 152 to 164.

Courts of admiralty, which proceed according to the forms and principles of the civil law, do not regard formal defects in bonds.

Thus, an instrument void as a bond has been held good as a stipulation. United States v. Sawyer, 1 Gall. C. C. R. 145.

So a bond not according to the usages of the admiralty has been held good on the ground, that those who had entered into the stipulation and had the advantage of it, ought not to be permitted to allege any unimportant informality in their own act. United States v. The Schooner Little Charles, 1 Brockenborough R. 380. And see the following common law cases; Wiser v. Blachly, 1 Johns. Chan. R. 609. Burn v. Burn, 3 Vesey, 575. Rawstone v. Parr, 3 Eng. Con. Ch. R. 424, 539. D'Olliff v. Sou. Sea I. Co. cited 1 Vesey, 601, and Dane's Abridgment. Gillespie v. Moon, 2 Johns. Ch. R. 595, and the causes cited at p. 599.

Dunbar, for the appellant. The contract of a surety is to be construed strictly both in law and equity, and his liability is not to be extended by implication beyond the terms of his contract. He has a right to stand upon the very terms of his contract. Miller v. Stewart, 5 Con. Rep. S. C. U. S. 727.

This court has decided, that a mistake as to the term at which the judgment was rendered, in a petition of appeal, is fatal. Martin v. Rutherford et al. 6 Mart. N. S. 281. And that the true inquiry, on motion to dismiss an appeal for a defect in the appeal bond, is, could a recovery be had on the bond. A fortiori, must a mistake in the bond of the date of the judgment, be more fatal than in the petition of appeal. Pleasants v. Botts et al. 5 Mart. N. S. 128. Why was the appeal dismissed in the case cited for the mistake in the petition? Because, from the judgment really rendered, there was no appeal. If there has been no appeal from Vol. VII.

the judgment recited in the bond, there cannot have been a forfeiture of the bond.

This appeal might have been dismissed; and if, from the laches of plaintiff it has not been done, the surety is not to suffer. Nothing could be done or left undone by the plaintiff that would affect the rights of the surety. McCaleb v. Maxwell, 6 Mart. N. S. 528.

In New York it has been decided that such a variance is fatal. 3 Wend, 426.

The evidence excepted to should not have been admitted. The fact of the proceedings in this case being summary makes no difference. If a regular suit had been brought, and the bond declared on, the breach of the condition must have been set forth; and evidence of a judgment rendered on a different day from the one in the bond and the affirmance of it by the Supreme Court, would not have been admissible. Pilie v. Mollere, 2 Mart. N. S. 667. The date of a judgment it is said, in 3 Wend. 426, may not be given in the bond, but if given incorrectly it is fatal. The date of a judgment in many respects is very material. It shows whether the appeal lies, for it may have been prescribed. It might have a preference as a mortgage by being recorded, &c.

If a mistake was made in the bond, it was by the lawyer of Gloyd & McDonnell, and it does not appear that the surety had any hand in it, except so far as signing the bond as the agent of Gloyd & McDonnell, and for himself as surety. It was not necessary or material that he should have signed for Gloyd & McDonnell; and the contracts as agent and surety, are as distinct as if signed by different persons.

It is a general rule, that parol evidence of the intention of the parties is not admissible in law or equity, to vary or add to the terms of a written agreement. If the agreement is certain, explained in writing, and signed by the parties, that binds them. 1 Phillips on Evidence, 555, 567.

But if the exception to the evidence was not properly taken, yet it comes to the same thing: the plaintiff has failed to make out his case, by offering a judgment of a different date from that for which the defendant was surety on appeal. Victoire et al. v. Moulon, 8 Mart. 400.

The appeal bond in this case is void, because every contract must have a certain object which forms the matter of agreement. The judgment recited in the bond has no existence. That which does not exist, or has ceased to exist, cannot be the subject of a contract. Civ. Code, art. 1772. Duranton, vol. 10, Nos. 302, 303, 304. Pothier Traité des Obligations, Nos. 129 to 140 inclusive.

MORPHY, J. D. C. Waterman is appellant from a judgment rendered against him on an appeal bond. He signed in the name of the defendants as their agent, and in his own name as This instrument, which is in the usual form, retheir surety. cites, that the judgment appealed from was rendered on the 29th of June, 1839, instead of the 14th of June, its real date. mistake seems to have been committed by filling up the blank in the printed form of the bond intended for the date of the judgment, by that of the bond itself, which, together with the petition of appeal and the order of the Judge allowing the appeal, bears date the 29th of June, 1839. In consequence of this mis-recital in the bond, the appellant claims to be discharged from all liability, on the ground that he became surety for an appeal from a judgment rendered on the 29th of June, 1839, and was not surety for an appeal from one rendered on the 14th of June, 1839. On the trial below, the plaintiff in the rule offered in evidence the record and judgment in the suit of Blanchard, Executor of Nicolet v. Gloyd & McDonnell, in which the appeal had been taken and the bond filed, together with the testimony of two wi nesses, to show that the date of the rendition of the judgment as set forth in the appeal bond was a mistake, and that the judgment of the 14th of June, 1839, was the only one ever rendered between these parties in the Commercial Court. The introduction of this evidence was resisted by the appellant, and a bill of exceptions was taken to the opinion of the Judge who admitted it. We do not think that he erred. The evidence offered goes to show a mistake, or clerical error in the bond, against which relief would be afforded in chancery by the admission of oral evidence. In the language of Starkie, 4 part, p. 1017, "the extrinsic evidence in such cases, is not offered to contradict a valid existing instrument, but to show that, from accident or negli-

gence, the instrument in question has never been constituted the actual depository of the intention and meaning of the parties." This court, which is one of equity as well as of law, has relieved parties against accidental mistakes of this kind. 1 Robinson, 257. 15 La. 312. 4 La. 433 and 350. 9 La. 574. Story's Equity Jurisp. § 152 to 164. 5 American Common Law, p. 177, and cases quoted there. From an inspection of the bond itself, there can be no doubt as to what the appellant intended to do, when he signed this bond as agent of the defendants, and in his own name as their surety. His purpose was to secure to them an appeal in this particular suit, and from the judgment which had been rendered in it. The object of stating the date of the judgment was to describe it more fully. If a mistake has been accidentally committed in this part of the description, when the judgment is otherwise described so as to leave no doubt of its being the one which the parties had in contemplation, shall this single mis-recital have the effect of avoiding the bond by which the appellant intended to bind himself? Shall he be permitted to shelter himself from the responsibility he intended to incur, by pleading a defect in the bond which did not mislead him, and which may be attributed to his own negligence, as he executed that instrument in his double capacity of agent and surety of the defendants in the suit? In Penniman v. Barrymore, we held, that neither the principal, nor surety can escape from responsibility by an error that arises in drawing up the act by which they contemplated binding themselves. 6 Mart. N. S. 498. and the authorities quoted there. It is said, that the obligation of a surety is to be construed strictly both in law and equity; that his liability is not to be extended by implication; and that he has a right to stand upon the very terms of his contract. true: but it is equally true, that the object of all written contracts is to express the intention of the parties. If such intention clearly appears from the whole tenor of the instrument, and by the manner in which it was used and acted upon, the instrument is not to be avoided, on a clerical error, as to the surety any more than as to the principal obligor. A bond signed by a surety is as much his contract as it is the contract of his principal; and both will remain bound, as it is shown they really intended to bind them-

Civ. Code, art. 1951. 3 Mart. 569. 2 Ib. N. S. 672. selves. 16 La. 174. 19 La. 179. In 10 La. 411. 5 La. 129. the present case, the appellant being the agent of the defendants. well knew from what judgment he had thought proper to appeal Had the mistake in relation to its date been dison their behalf. covered at the time of signing the bond, and pointed out to him. he would no doubt have corrected it, in order to entitle his principals to their appeal, as his neglect to take such appeal might have made him responsible to them. Whether the defect in the bond proceeded from error or bad faith, such error or bad faith was his own, and he cannot take advantage of his own wrong. It may be that the appeal might have been dismissed at the instance of the appellee, in consequence of this error in the bond: but it does not necessarily follow that after the appeal has been suffered to have its effect, the parties who furnished the bond can ask for its nullity on that ground. It is finally urged, that the contract is void for want of a subject matter, as the judgment recited in the bond has no existence. The rule falsa demonstratio non nocet, properly applies here. The judgment referred to in the bond as having been rendered in this suit, really exists, but has been erroneously described as to its date. So much of the description as is false must be rejected; and the instrument must have its effect, if a description remain sufficient to ascertain the application of the instrument, 2 Phillips, 713. Here the bond recites the names of the parties, that of the court which tried the suit, the amount, &c., so as to leave no doubt as to the identity of the judgment in relation to which it was given.

Judgment affirmed.

Berthaud v. The Police Jury of Jefferson.

EVARISTE BERTHAUD v. THE POLICE JURY OF THE PARISH OF JEFFERSON.

Where the facts upon which an application for a prohibition to arrest the proceedings in an action is based, appear from the record of the case itself, they need not be supported by the oath of the applicant.

A Police Jury is a corporation established for the whole parish, and cannot be sued in any court the territorial jurisdiction of which is limited to a part of the parish, though the Parish Judge, who is ex officio president of the jury, and the clerk reside within the limits of its jurisdiction, and though the jury itself meet and keep its records at a place within the jurisdiction of the court. It has no domicil but the parish, and must be sued in a court having jurisdiction over the whole parish. Nor does it make any difference that the work for which the plaintiff seeks remuneration, was done within the territorial jurisdiction of the court.

Rule on the plaintiff and on Carrigan, Judge of the City Court of Lafayette, to show cause why a writ of prohibition should not be issued forbidding them to proceed any further in the case of Berthaud v. The Police Jury of the Parish of Jefferson. The plaintiff and Judge of the City Court showed cause as stated in the opinion of Martin, J.

Dugué, for the applicant.

Michel, contra.

MARTIN, J. The defendants obtained on the plaintiff and the Judge of the City Court of Lafayette, a rule to show cause, why a writ of prohibition should not be issued from this court, forbidding them from proceeding in the present case.

The plaintiff showed for cause: 1st That the City Court has invisdiction of suits of the amount claimed:

2d. That with regard to the exemption of the defendants from being sued in the City Court of Lafayette, on account of their domicil not being within its jurisdiction, the act of 1835, establishing the court, extends its jurisdiction from the lower line of the city, to the upper line of the town of Carrollton, and back as far as Metairie; that in 1840 the jurisdiction was confined to the corporate limits of the city; but that in 1843 the jurisdiction was raised to one thousand dollars, and its territorial jurisdiction reinstated in the limits of the act of 1835: that the domicil of the defendants is within the city according to the 198th art. of the

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Code of Practice, under which suit is to be brought in the place where the Mayor and other officers of the corporation hold their offices; that the Judge of the parish of Jefferson, ex officio president of the Police Jury, resides and holds his office within the city, as well as the clerk of the jury, the meetings of that body being held and their records kept there; further, that the labor for which the plaintiff seeks remuneration was performed within the jurisdiction of the court; and lastly, that the facts on which the application for the writ of prohibition is grounded, are not accompanied by the oath of the petitioner, and are not self-evident. Code of Practice, art. 848.

The Judge showed for cause, that having carefully examined the laws relating to his court, and maturely reflected on the corporate capacity of the defendants, he was and still is of opinion that he has jurisdiction of the case, and is bound to exercise it.

It is true, that the facts upon which the interposition of this court has been sought, are not accompanied or supported by the petitioner's oath; but they are made evident by a transcript of the whole record of the suit, in which the proceedings of the City Court are sought to be arrested.

It is also true, that the amount sought to be recovered is within the jurisdiction of the court; but it is equally so, that Police Juries are corporations established for the concerns of the whole parish, and are not suable in courts the territorial jurisdiction of which is limited to a particular part of the parish, although the Parish Judge, who is president, ex officio, and their clerk may reside within the limits of the jurisdiction of such court, which does not acquire jurisdiction over them in consequence of the place where they may meet and keep their records. Like all other citizens, they are suable in the courts of their own domicil; and as their members reside in different parts of the parish, the body has no domicil but the parish.

The circumstance of the work for which the plaintiff seeks remuneration having been performed within the jurisdiction of the City Court, does not authorize him to sue the defendants in any other court than that of their domicil. The 198th article of the Code of Practice, to which we are referred, relates only to the manner in which the service of writs is to be made in suits which

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are brought against a corporation, &c.; but that article is perfectly silent as to the courts in which suits against those bodies are to be instituted. It is very clear, that the court of the parish of Jefferson, and that of the First Judicial District, of which that parish is a part, are the proper courts of the defendants' domicil.

It is, therefore, ordered, that the writ of prohibition be issued as prayed for; and that the plaintiff pay the costs of it, and of this application.

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Where the real date of an act sous seing privé is not proved aliunde, it will date as to third persons, only from the day of its production in court.

McMichael v. Davidson, 53.

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AGENT.

1. Where notes given for the price of a tract of land are left in deposit with the notary by whom the act of sale was drawn up, the notes or their proceeds to be delivered to the vendor when the property sold shall be released from certain incumbrances, and the notary places them in a bank for collection, and suffers them to remain there after the bank had suspended specie payments, until the makers paid them in the depreciated notes of the bank, he will be responsible to the vendor for the full amount of the notes.

Dupeux v. His Creditors, 242.

2. The master and others employed in the navigation of a vessel, though servants of the owners in different grades of authority, are competent witnesses for their employers. A witness is not incompetent because he is, or has been in the employment of the party who calls him.

Randall v. Laguerenne, 327.

- A principal is bound by the representations of his agent made in the transaction of the business of his employer. Hills v. Jacobs, 406.
- As a general principle, corporations are responsible for the acts of their agents; but they are not liable for every act of the persons in their employ-Vol. VII.

ment. Where an agent acting in the capacity bestowed on him by a corporation, under the directions of his employers, or in the discharge of some duty incidental to his situation, does any act which causes damage to another, the corporation will be responsible; aliter where an act is done by him of his own free will, without reference to his functions as an agent. Thus a bank cannot be made liable in damages for an unauthorized declaration made by one of its officers, that plaintiff had frequently overdrawn his account. C. C. 430, 431, 433, 434. Etting v. Commercial Bank, 459.

5. An action by the stockholders against the directors of a bank for damages for losses sustained through their negligence, fraud or mismanagement, is prescribed by ten years from the date of the acts complained of.

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APPEAL.

- I. From what Judgments an Appeal will lie.
- II. Appeal Bond.
- III. Process to Compel the Allowance of an Appeal.
- IV. Citation of Appellee.
- V. Record of Appeal.
- VI. Matters urged for the first time after Appeal.
- VII. Judgment on Appeal, and Costs.
- VIII. Surety on Appeal Bond.
 - I. From what Judgments an Appeal will lie.
- 1. No appeal will lie from a judgment setting aside a seizure of the property of an insolvent, made under a fi. fa., issued after the commencement of the insolvent proceedings. Per Curiam: The judgment works no irreparable injury. It does not deprive the party of any advantage he may have gained by the seizure, which may be claimed on the filing of the tableau of distribution. Its only effect is to place the property in the hands of the syndic to be administered. Jacobs v. Bogart, 162.
- 2. An appeal will lie from a judgment making absolute a rule to show cause why certain property, purchased by defendant at a judicial sale, but not paid for according to the terms of the adjudication, should not be re-sold at his risk. The judgment, if executed, may work an irreparable injury, for the

re-sale of the property might place it in other hands from which the reversal of the judgment below could not displace it. Andry v. Fourchy, 232.

3. The Legislature having made no provision for the exercise of criminal jurisdiction by the Supreme Court, and the court having repeatedly declined to assume it, the question can no longer be considered as an open one.

State v. Williams, 252.

- 4. The first section of the statute of 29 January, 1817, forbidding the introduction into this State of slaves convicted of certain crimes, and denouncing a fine of five hundred dollars for every slave brought into the State in violation of its provisions and the forfeiture of the slave, one-half for the use of the State and the other half for the use of the informer, creates an indictable offence; and where the proceedings against one charged with a violation of the statute were by indictment, no appeal will lie from a sentence pronounced on the verdict of a jury, declaring the slaves so imported to be forfeited, and condemning the offender to pay the fine imposed by the statute and the costs, and to stand committed until they are paid. Ibid.
- 5. A plaintiff, who instead of submitting his case to the jury on the evidence received, moves for a nonsuit with leave to set it aside, may appeal from a decision of the court refusing to set aside the nonsuit and grant a new trial. Per Curiam: Such a mode of proceeding is a convenient way of bringing up for the decision of the Supreme Court incidental questions, without going into a trial on the merits of the ease. Clossman v. Barbancey, 428.
- 6. An order having been granted enjoining defendants from obstructing a passage way alleged to be necessary to the use of houses belonging to the plaintiff, the latter subsequently took a rule on defendants to show cause why the obstructions which prevented the free use of his property should not be immediately removed at their expense. Plaintiff having appealed from a judgment refusing to order the removal of the obstructions until the case could be tried on the merits, on a motion to dismiss the appeal on the ground that the judgment was not a final one, nor the injury irreparable: Held, that an appeal will lie; that the judgment is final so far as it relates to the immediate removal of the obstructions; that it is not indispensably necessary to entitle a party to appeal from an interlocutory judgment, that the injury should be absolutely irreparable, it being sufficient that it may become so; and that the obstruction of a passage, by which a party can get in or out of his house is, in its immediate consequences, so serious an injury, as to be considered irreparable. M Donogh v. Calloway, 442.
- A judgment is incohate only, and no appeal lies from it, until signed by the judge. Mechanics and Traders Bank v. Walton, 451.

II. Appeal Bond.

8. Where an appellant fails to comply with the condition on which an appeal was allowed, by not giving bond within the time during which an appeal may be taken, the judgment will become res judicata.

City Bank v. Kent, 60.

III. Process to Compel the Allowance of an Appeal.

 Where the judge of an inferior court refuses obedience to an order of the Supreme Court directing him to allow an appeal, he may be committed to prison until he complies with such order. State v. Williams, 252.

IV. Citation of Appellee.

10. An irregularity in the service of citation of appeal on one appellee, will not authorize the dismissal of the appeal on his motion, much less on that of his co-appellee. Whittemore v. Watts, 10.

V. Record of Appeal.

11. Where the certificate of the clerk states that the record contains copies of all the documents on file, and a complete transcript of all the proceedings had and of all the testimony adduced on the trial, it is sufficient.

Whittemore v. Watts, 10.

12. Where on an appeal from a judgment confirming one taken by default, the record contains no statement of facts, and the certificate of the clerk shows that parol evidence was produced on the trial, but not taken down in writing, it will be presumed that plaintiff's claim was proved by legal evidence before the judgment by default was made final.

Landry v. Jefferson College, 179.

- 13. Where the testimony introduced on the trial has not been taken down in writing, the party intending to appeal must require the adverse party, or his counsel, to draw, jointly with him, a statement of the facts proved, to be annexed to the record. C. P. 602. It is only when the other party refuses to join in making out such a statement, or when the parties cannot agree, that the party intending to appeal has a right to call upon the court for a statement of facts. C. P. 603. Ibid.
- 14. Where the facts of a case appear only from a statement made by the judge, and there is no assignment of error or bill of exceptions, no point of law can be examined which does not arise from the facts stated by the judge; nor can the allegation of any fact not found in such statement be attended to. Halsey v. Voorhees, 355.
- 15. Proceedings in the court from which an appeal has been taken, had subsequently to the judgment complained of, and not embraced in the original record, cannot be noticed. Succession of Gourjon, 422.
- 16. Where there is no statement of facts, assignment of error, or bill of exceptions, and the record shows that it does not contain all the evidence upon which the case was tried below, the appeal must be dismissed.

Dufour v. Lombard, 450.

VI. Matters urged for the first time after Appeal.

17. Where a creditor who has been placed on the schedule of an insolvent, and made a party to the proceedings for a forced surrender under the act of 1808, does not prove his debt, nor make any opposition in the lower court

to the discharge of the insolvent from his debts, it will be too late to oppose his discharge on an appeal. Jacobs v. Bogart, 162.

VII. Judgment on Appeal, and Costs.

- 18. Where the appellants cannot be injured by the judgment of the lower court, it will be affirmed.
 - Lang fitt v. Clinton and Port Hudson Railroad Company, 41.
- The decision of a court of the first instance refusing a new trial, will not be reversed unless clearly erroneous. Davis v. Singleton, 56.
- 20. An appellant will not be allowed, by delaying to complain, till after appeal, of a trivial error in the judgment, which would have been corrected below had it been asked for, to mulct the other party with the costs of the appeal.

 Union Bank v. Lea, 75.
- 21. A prayer for the removal of an administratrix, presented for the first time on an application for a new trial, after judgment overruling an opposition to an account filed by her, is too late. To notice such a prayer on appeal, no issue thereon having been made or tried below, would be to assume original jurisdiction. Succession of Kendrick, 138.

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VIII. Surety on Appeal Bond.

- 22. The widow and heirs of a surety on an appeal bond cannot be proceeded against in the same manner as the surety himself may be, under the 20th sect. of the act of 20 March, 1839, amending art. 596 of the Code of Practice. In authorizing the summary remedy provided by that act, the legislature contemplated no other proceedings than those against the surety himself. Saulet v. Trepagnier, 227.
- 23. Where a judgment rendered below is affirmed on appeal, but the case remanded for the purpose of ascertaining the amount of expenses and damages due to the plaintiff for the reimbursement of jail fees, and other charges incurred in taking care of the property in dispute pending the suit, the amount of which had not been liquidated, though the right of the plaintiff to recover them had been recognized in the judgment of the lower court, the surety on the appeal bond will not be discharged. There is no change in the judgment appealed from. C. P. 579. Hivert v. Lacaze, 470.
- 24. An error as to the date of the judgment appealed from, committed in filling up a blank in an appeal bond signed by a party as the agent of the appellants and in his own name as surety, will not discharge the surety, where the judgment is otherwise sufficiently described. Per Curiam: The object of all written contracts is to express the intention of the parties, and where that clearly appears from the whole tenor of the instrument and the manner in which it was used, it will not be avoided for a clerical error, as to the surety, any more than as to the principal obligor. C. C. 1951. The rule falsa demonstratio non nocet properly applies to such a case. So

much of the description as is false must be rejected, and the instrument have its effect if a sufficient description remain.

Blanchard v. Gloyd, 542.

ASSIGNMENT.

See TRUST, DEED OF, 1, 6.

ATTACHMENT.

The garnishees having bonded certain property attached by plaintiff, a third person subsequently intervened claiming the property and praying for a dissolution of the attachment. On an exception by plaintiff on the ground that the property had been released on the execution of the bond, the intervention was dismissed. Per Curiam: Property attached is represented by the bond given for its release only as to the attaching creditor, and for the sole purpose of satisfying any judgment he may obtain. Third persons, claiming it as owners after it has been bonded, must look to the property itself, which is no longer under the control of the court. Beal v. Alexander, 349.

ATTORNEY AT LAW.

1. Defendant, an attorney at law, having recovered a judgment for the plaintiff, subsequently purchased certain slaves from the debtor, and in part payment, assumed the debt due by the latter to his client. In an action by the client to enforce payment of the debt assumed, and defence that plaintiff had never notified defendant of his acceptance of the assumption: Held, that the attorney was bound to hold on to any advantage he had acquired for his client, and to notify him thereof immediately; and that the relation existing between the parties bound the attorney to comply with his assumption, without waiting for the acceptance of his client, and notice thereof.

McMichael v. Davidson, 53.

2. An attorney at law is responsible for any injury resulting from his neglect of business intrusted to him. Thus where an attorney employed by the administrator to prepare and file a tableau of distribution of the effects of a succession, neglects to avail aimself of the means of obtaining correct information, but prepares, and without submitting it to the administrator, files a tableau by which the balance in the hands of the latter is represented as much larger than it really is, and, after the errors are pointed out to him by the administrator, neglects to have it corrected, and the tableau is finally homologated, he will be responsible for the injury which the administrator may sustain in consequence of such neglect. Nor will it be any defence to an action against him to allege, that if the administrator were charged with interest on the sums which had remained in his hands, the balance represented by the tableaux would not exceed the amount really due to the succession, he having no right to benefit by a debt, which, if it exist, is owing to the creditors or heirs of the estate. Thompson v. Lobdell, 369.

3. Where, through the negligence of an attorney in preparing a tableau of distribution of the effects of a succession, the administrator is made liable, by its homologation, for an amount larger than was really due by him, and proceedings are subsequently commenced for correcting the error, after the termination of which the amount so represented to be due is collected, under execution, from the administrator, prescription will run in favor of the attorney only from the date of the actual payment by the administrator. Ibid.

ATTORNEY IN FACT.

See AGENT.

BANK.

- I. Banks generally.
- II. Citizens Bank of Louisiana.
- III. Commercial Bank of New Orleans.

I. Banks generally.

1. By sect. 13 of the act of 14 March, 1842, for the liquidation of banks, it is provided, that it shall be the duty of the notary employed to make an inventory of the property and effects of the bank, and at the time of making such inventory, to destroy, under the inspection of the commissioners and of the board of currency, all the notes of the bank which may be on hand at the time, including such as may not be completed, in the presence of two witnesses and of the officers of the bank, if any be present, of all which mention shall be made in the inventory. Held: that the services required of the notary by this provision, are a part of the labor of making the inventory, and that he is entitled to no additional compensation therefor.

State v. Atchafalaya Railroad and Banking Company, 198.

2. The delays granted to the debtors of the banks in the city of New Orleans by the third section of the act of 5 February, 1842, reviving the charters of these banks, apply only to the debts due to the banks at the time of the passage of the act. That act contemplated that any debtor desiring to obtain the extension of time for which it provides, should make a direct application to the board of directors of the bank to which the debt was due, stating the security which he proposed to furnish, and that such security, whether real or personal, should be examined and found satisfactory by the board, before allowing the extension. Planché v. Roy, 453.

II. Citizens Bank of Louisiana.

3. Under the 24th sect. of the act of the 1 April, 1833, incorporating the Citizens Bank of Louisiana, which provides "that all property mortgaged to the bank for any purpose, may be seized and sold, at any time, according to law, in whosoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession by succession or descent

to heirs or legatees by last will and testament, or otherwise, in the same manner as if the same was in possession of the original mortgagor," the bank may obtain from a court of ordinary jurisdiction an order of seizure and sale against property mortgaged to it, though in possession of the executor of the mortgagor, on notifying the latter in order to give him an opportunity by paying the mortgage debt, to avoid being disturbed.

Citizens Bank v. Buisson, 506.

III. Commercial Bank of New Orleans.

See CONTRACTS.

BANKRUPT.

The fact that one named as an executor has become a bankrupt since the death of the testator, and before his application to be recognized as such, does not disqualify him. Per Curiam: The law (C. C. art. 1150) contemplates a change in the condition of the executor, after he shall have entered on the discharge of his duties, by becoming a bankrupt, as good ground for removal; but it does not follow that he becomes legally disqualified for a future appointment, by such a change. Succession of Gourjon, 422.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. Presentment for Payment, Protest and Notice.
- II. Promise to Pay, and Payment after Discharge.
- III. Evidence in Actions on Bills and Notes.
- IV. Defence to Actions on Bills and Notes.
 - I. Presentment for Payment, Protest and Notice.
- Proof of notice of protest directed to the legal representative of an endorser who had died before the maturity of the note, is insufficient to entitle the holder to recover in an action against the heir of the latter.

Christmas v. Fluker, 13.

- 2. Where a notary certifies in his protest that he demanded payment of a note at the place at which it was payable, though he does not state that he took the note with him or presented it for payment, it is sufficient. Per Curiam: The person making a presentment or demand must have with him the bill or note he is charged to collect; but the presumption is that the notary did his duty, until the contrary be shown. Harbour v. Taylor, 32.
- 3. Notice of the protest of a draft, instead of being directed to the endorser at the post office at which he was in the habit of receiving his letters, was directed to that office, under cover to the holder, who received the notice, and, on the next day, deposited it in the same office, directed to the endorser there: Held, that the notice was insufficient under the statute of 13 March, 1827; that it should have been directed to the endorser at his domi-

- cil or usual place of residence, and not have been sent to a third person to be subsequently deposited in the same post office; and that where the mail is resorted to as the earliest ordinary conveyance, such conveyance must not be interrupted. Carmena v. Doherty, 57.
- 4. Notice of protest to an endorser, deposited in the post office of the place in which, or in the neighborhood of which, he resides, is insufficient under the general commercial law. Ibid.
- 5. Where a notary states in his protest of a note, "that he demanded payment of the note of the cashier" of the bank, at which it was payable, at the bank, "who answered that it could not be paid there being no funds in bank for that purpose," it is sufficient. On an objection that there was no evidence that the notary presented the note to the cashier: Held; that the latter having said there were no funds to pay the note; no presentation was necessary. Union Bank v. Lea, 75.
- 6. The holder of a promissory note on which there are several endorsers, is only bound to give notice of protest to the one whom he intends to hold liable. If the endorser so notified wishes to secure his recourse against the others, he must give notice himself, where it has not been done by the holder. Ibid. Union Bank v. Hyde, 418.
- 7. Where a notary states in his protest of a note, "that he demanded payment of the note of the cashier" of the bank at which it was payable, at the bank, it is sufficient. It was unnecessary to state that the note was presented when the demand was made.

Union Bank v. Penn, 79. Pest v. Dougherty, 85.

- 8. The naming of a city at large is not such an indication of a place of payment of a note, as will make it necessary to make a demand anywhere to entitle the holder to recover. Per Curiam: The words place of payment mean a house, bank, counting-room, store, or place of business, where the holder can present the note, and the maker provide or deposit funds to meet it, and where a legal offer to pay can be made. Montross v. Doak, 170:
- 9. The certificate of a notary by whom a bill or note has been protested should state the day on which notice was given to the endorser. It is not necessary to mention the date of the letter containing the notice.

Palmer v. Lee, 537.

10. Where, after due diligence, a notary is unable to ascertain the residence of an endorser, notice of protest must be put in the nearest post-office to the place at which such protest was made, addressed to him at the place at which the note or bill appears, from its face, to have been drawn. Notice in a letter addressed to the endorser, and left at the domicil of a subsequent endorser is insufficient. Act 13 March, 1827, § 3. Ibid.

II. Promise to Pay, and Payment after Discharge.

11. A promise to pay a bill, made by an endorser who has been discharged by the laches of the holder, to be binding, must have been made with full knowledge of such laches, and with the intention of waiving his legal rights. Dis-

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- rect proof of such knowledge is not required; it may be inferred from circumstances attending the promise. Heath v. Commercial Bank, 334.
- 13. Money paid by the endorser of a bill who had been discharged by the lackes of the holder, in ignorance of his discharge, may be recovered back. C. C. 2280. There is, on his part, no such natural obligation to pay, as can prevent his recovering the amount. C. C. 2281. Per Curiam: His undertaking was, to pay, provided the holder made due demand of the acceptor, and gave him due notice of non-acceptance or non-payment. His obligation was conditional; and when the condition failed, he was under no obligation, either natural or civil, to pay. Ibid.
- 13. Where in an action against the endorser of a note the holder relies on a promise to pay made after the endorser had been discharged by the lackes of the holder, it is incumbent on him to show that the promise was made by the endorser with full knowledge that he had been so discharged. But an actual payment furnishes a presumption of indebtedness; and where an endorser seeks to recover back the amount of a note on the ground that it was paid by him in ignorance of the fact that he had been discharged, he must show that he was so discharged. Union Bank v. Hyde, 418.

III. Evidence in Actions on Bills and Notes.

14. The certificate of a notary, though without a date, is legal evidence to show the manner in which the notice of protest to the endorser of a note was served or forwarded. Its insufficiency, from the want of a date, to establish the diligence used in serving the notice, is no reason why it should not be received so far as it goes. Act 13 March, 1827, § 1. It is evidence of all the matters therein stated, and other evidence may be introduced to show a complete compliance with all the requisites of the law. The testimony of the notary may be used to establish the date of the certificate and notice: such evidence, not contradicting, but merely supplying an omission in the certificate. Per Curiam: It might, perhaps, be otherwise, if the evidence was intended to contradict the certificate.

Union Bank v. Penn, 79.

- 15. The statute of 13 March, 1827, which authorizes the certificate of the notary by whom a note or bill has been protested, to be used as evidence of the manner in which the demand was made, and notices of protest served, introduced a new mode of proof of the facts therein stated; but it does not preclude a party who may not choose to resort to it, from producing parol evidence of such facts. *Ibid.*
- 16. Where in an action against the maker and endorser of a note, the maker pleads that she was a married woman at the time of executing the note, which was signed by her as surety for her husband, and that she was in no way benefitted by the consideration received therefor, and the endorser answers separately but adopts the defence set up by his co-defendant, he cannot be examined as a witness for the latter to establish the facts alleged in her answer, being interested in destroying her obligation as maker.

Macarty v. Roach, 357.

17. The endorser of a note is a competent witness for the maker where the facts attempted to be proved by his testimony have no tendency to affect his responsibility, nor to change, as to him, the ultimate result of the suit.

Ibid.

- 18. The act of 27 March, 1823, so far as it renders the maker of a note, bill of exchange, or other negotiable paper incompetent, under any circumstances, in any action by the holder against an endorser, was repealed by article 3521 of the Civil Code. Ibid.
- 19. Where on an appeal from a judgment confirming one taken by default against an absent defendant as endorser of a bill of exchange, the record shows that no evidence was introduced to establish the agency of the person on whom the citation was served, nor to prove the signature of the defendant or a demand and notice of protest, the judgment must be reversed.

Mechanics and Traders Bank v. Walton, 451.

- 20. The testimony of a witness that he gave defendant legal and timely notice of the pretest of a bill, is insufficient to prove notice. Per Curiam: A notary, or other person called to prove a notice of protest, must state the time, manner, and circumstances under which the notice was given, that the court may judge of its sufficiency. He is not to take upon himself to decide upon its sufficiency. Ibid.
- 21. A promise by an endorser to pay the amount of a bill exceeding five hundred dollars, made after protest, is an agreement to pay money, which, ander art. 2257 of the Civil Code, must be proved by one credible witness, and other corroborating circumstances appearing aliunde. Ibid.

IV. Defence to Actions on Bills and Notes.

22. The maker of a note secured by mortgage when sued by a party subrogated to the rights of the payee, cannot defend himself by alleging that the syndic of the creditors of the payee, by whom the subrogation was made, had no authority to make it. The creditors alone can complain if the syndic acted illegally. The defendant is not called upon to protect their rights.

Planché v. Roy. 453.

CARRIERS.

In an action against the owners of a steamer to recover the value of property shipped on their boat, and not delivered pursuant to the bill of lading, where the defence is that the property was lost in consequence of a collision with another boat, without defendants' fault, evidence is admissible to show that the property was lost in consequence of the collision, without any fault or negligence on the part of defendants or their agents, and that the accident was unavoidable. Per Curian: If there was no fault or carelessness on the part of the defendants or their agents, and it was out of their power to prevent the collision, the accident must be considered unavoidable, and one of the dangers of the river within the meaning of the bill of lading, for which the carriers are not responsible. C. C. 9725. Van Hern v. Taylor, 201.

CITATION.

- Citation in an action of nullity must be served on the defendant himself, or the suit will be dismissed. C. P. 610. Service on the attorney of the defendant in the action in which the judgment sought to be annulled was rendered, is insufficient. Jacobs v. Ducros, 115.
- 2. Sect. 14 of the act of 16 March, 1826, which provides that where the party to whom notice is to be given, either of a final judgment or other proceeding in the City Court of New Orleans, does not reside within the jurisdiction of the court and has no attorney in fact, or at law resident therein, execution may be issued, or other proceedings had without notice, does not apply to the citation to a defendant. *Ibid*.
- One who intends to commence an action against the sheriff of a parish in which there is no coroner, must provoke the appointment of one, the coroner alone having authority to serve process on the sheriff. Ibid.

See APPEAL, IV.

CITIZENS BANK OF NEW ORLEANS.

See Bank, II.

CLINTON AND PORT HUDSON RAILROAD COMPANY.

The commissioners appointed under the second section of the act of 26 March, 1842, ch. 149, providing for the liquidation of the affairs of the Clinton and Port Hudson Railroad Company, are authorized to perform all conservatory acts necessary to protect the interests of the State. They are the agents of the State, and, in that capacity, may sue and be sued. Drummond v. Commissioners of Clinton and Port Hudson Railroad Company, 234.

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1053 to 1055. ————— Succession of Williams, 46.

COMMERCIAL BANK OF NEW ORLEANS.

See CONTRACTS.

COMPENSATION.

- 1. Compensation does not take place, by operation of law, between a debt due by a commercial partnership and one due to one of its members individually; and where the debt due by the partnership has been transferred to a third person and notice given to the debtors, the latter cannot plead the amount of the debt due to the individual partner in compensation, even by way of exception. Dick v. Burne, 465.
- In an action against a partnership for a debt, defendants may compensate
 by way of exception, a debt due by plaintiff to a member of the partnership
 individually. 1bid.

CONFLICT OF LAWS.

- 1. The validity and effect of a will made and carried into execution in another State, and the kind of estate which it confers upon the legatees especially as to personal effects situated in that State, must be tested by the law of the domicil of the testator and not of the legatees. Penny v. Christmas, 481.
- 2. Where property acquired under a will executed in another State is brought by the legatee into this State, where he dies, it must descend according to the laws of this State. The right of inheriting property situated here cannot be governed by the laws of another State, though originally acquired and brought from that State. *Ibid*.

CONFUSION.

Where a debtor of a succession becomes entitled to the succession by inheritance from the heir, his debt will be extinguished by confusion only to the amount remaining after the payment of all the debts of the estate. C. C. 2214. If the debts are unpaid, the executor may recover from the debtor the amount necessary to pay them; or if they have been discharged by advances made by the executor, he may recover from the debtor the amount

of such advances, the debt.of the latter being extinguished only to the amount coming to him from the succession after the payment of all its debts.

Brunetti v. Barnabé, 117.

CONSTITUTION OF LOUISIANA.

Art. 4, § 2. Jurisdiction of Supreme Court. State v. Williams, 25%.

CONSTITUTION OF THE UNITED STATES.

- Art. 1, § 8. Power of Congress to lay taxes, imposts, duties, &c. State v. Fullerton, 210.
 - 4, § 1. Public Acts, Records and Judicial Proceedings of other States.

 Tait v. Lewis, 206. Succession of Tilghman, 387.
- On a question as to the constitutional authority of Congress, and the consequent restriction upon the power of State Legislatures, a decision of the Supreme Court of the United States must be regarded as settling the law.

State v. Fullerton-Re-hearing, 219.

CONTINUANCE.

- An affidavit for a continuance on the ground of the absence of a witness,
 which does not show the materiality of his testimony, nor due diligence to
 procure his attendance, is insufficient. Daniels v. Andrews, 160.
- 2. Plaintiffs offered in evidence a paper proved by a witness to be a copy made by him at the request of one of the defendants from the original handed to him by the latter for that purpose, and which, with the original, had been returned to the defendant. Plaintiffs, having made oath that they had seen the original in possession of one of the defendants, notified the latter to produce the original. Two of the defendants answered that they had no such paper in their possession, nor had ever seen it, and that their co-defendant was absent, and moved for a continuance on the ground of surprise. Held, that the absence of the defendant to whom the original had been delivered was no ground for a continuance, and that the absence of the original was safficiently accounted for to authorize the admission of the copy.

Hills v. Jacobs, 400.

CONTRACTS.

1. Plaintiff having recovered judgment against defendant, who was in community with his wife, caused a fi. fa. to be levied on certain lots of ground, which were purchased by A. at twelve months credit, who gave his bond for the price. Defendant subsequently made a surrender to his creditors; and plaintiff afterwards proceeded against the purchaser, under the 13th section of the act of 20 March, 1839, propounding interrogatories to him to ascertain whether he had property in his possession or under his control belonging to defendant, in which proceedings the syndic of defendant's credi-

tors intervened, claiming the property as belonging to the insolvent's estate. The purchaser answered, that he was requested by defendant's wife to purchase the property for her; and that he purchased the property, taking the title in his own name, but considered himself bound to make her a title therefor, provided the price be paid to him when the bond matures, and not The court, before which the proceedings under the act of 1839 were instituted, considered the purchase to have been made for the benefit of the community, and decreed the property to belong to the syndic, by whom it was sold, and purchased by plaintiff. Before the bond matured, defendant's wife obtained a judgment of separation of property, and, on the day of its maturity, tendered the price to A., demanding a conveyance of the lots. In an action by plaintiff to recover the property: Held, that the wife, not being a party to the proceedings under the act of 1839, the judgment in favor of the syndic does not conclude her; that though the community existed at the time of the purchase by A., yet that, at the maturity of the bond when the conveyance was to be made to the wife on her paying the price, she was separated in property, and capable of acquiring property for herself, independently of her husband; that the title was suspended, remaining in A., liable to be divested, on the performance of the condition, at the maturity of the bond; and that the fact that the wife was capable of acquiring at the expiration of the time limited, sufficed to make the contract valid, and to give her a good title to the property, independently of her husband, on her compliance with the conditions of the agreement. Lallande v. Terrell, 67.

- 2. Where by a written agreement entered into at the time of discolving a partnership, one of the partners who purchased the common stock bound himself to pay all the partnership debts, parol evidence will be inadmissible to prove a guaranty by the other partner, that the debts did not exceed a certain amount. C. C. 2256. Lynch v. Burr, 96.
- All contracts, not in writing, for the payment of any amount exceeding five hundred dollars, must be proved at least by one credible witness, and corroborating circumstances. C. C. 2257. Succession of Segond, 111.
- 4. Action for damages against defendant for falsely representing to plaintiff, that he had concluded a contract for him for the delivery of a quantity of shells, at a certain price per barrel. It was proved that no such contract had been made; but defendant answered that he was willing to receive the shells at the price mentioned, and to pay the costs. Per Curiam: The court cannot compel a party to accept a new contract in lieu of one already violated, with a new party and under different circumstances, nor to waive his right to recover damages. Daniels v. Andrews, 160.
- 5. In every action on a joint contract all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. C. C. 2080. Bird v. Doiron, 181.
- 6. By sect. 33 of the act of 1 April, 1833, incorporating the Commercial Bank of New Orleans, that institution is authorized to lay pipes in the streets of New Orleans for the purpose of supplying water for the use of the Vol. VII.

inhabitants, on the condition of restoring the streets, in as short a time as possible, to the condition they were previously in. Defendants having neglected to replace the pavements in certain streets in which they had laid pipes, the city authorities, through certain persons subrogated to their rights against the Bank, caused the pavements to be replaced. In an action by the latter against the Bank for the cost of the repairs: Held, that a notice to defendants that the pavements had not been properly replaced, and a demand of them to comply with the requisitions of the charter by repairing the streets, was indispensable to a recovery.

Gerl v. Commercial Bank, 188.

- 7. Where one who has undertaken to erect buildings for a certain price, and to have them completed by a particular period, fails by his fault, to comply with his contract, in consequence of which the other party, under a clause in the contract, annuls the contract and recovers possession of the unfinished buildings, he cannot recover the value of materials, such as door and window frames and other joiner's work, not in the buildings, and which were never tendered to the owner of the buildings, nor in any way used by him. Parker v. M'Gilway, 192.
- To render valid the ratification of an obligation against which an action of nullity or rescission would lie, the act of ratification must state the substance of the obligation, the motive of the action of nullity or rescission, and the in tention to supply the defect on which such action would be founded. C. C. 9252. Wilcos v. Henderson, 338.
- 9. A married woman, whether separated in property or not, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him during the marriage, (C. C. 2412): and when sued on such a contract, she may show by parol evidence, that she was only a surety, though such evidence expressly contradict her own declarations in an authentic act.

Macarty v. Roach, 357.

10. Where it is proved that plaintiffs were induced, through the misrepresentations of defendant, or his agents, to consent to accept in satisfaction of certain mortgage notes held by them an amount much below their real value, the agreement will be rescinded on the ground of error.

Hills v. Jacobs, 406.

11. Where plaintiff sues before maturity, on a written promise of defendant to pay him a certain amount at a future period, and introduces no proof that the amount was payable, as alleged by him, at an earlier period, he must be nonsuited. Carter v. Hodge, 433.

See APPEAL, 24.

CORONER.

See SHERIFF, 1.

INDEX.

CORPORATION.

Corporators may maintain an action against each other relative to the affairs of the corporation, during its existence. Percy v. White, 513.

COSTS.

An appellant will not be allowed, by delaying to complain, till after appeal,
of a trivial error in the judgment, which would have been corrected below
had it been asked for, to mulot the other party with costs of the appeal.

Union Bank v. Lea. 75.

- 2. A judgment of nonsuit can, in no case, support the plea of res judicata. The fact that the costs of the action in which a judgment of nonsuit was rendered are unpaid, is only ground for a dilatory exception to protect the defendant from a second action before the costs of the first are paid. But where one claiming property seized under a fi. fs. against a third person, opposes the sale, and the judge, without deciding on the merits of the opposition, merely decrees that the costs of it shall be paid by the oppount, the payment of the costs is a condition precedent to his filing a second opposition, but not to an action by him in another court, against the purchaser at the sheriff's sale, for the restitution of the property and for damages for its detention. C. P. 536. Mills v. Webber, 108.
- 3. Where an action for the rescission of a lease, in which defendant claims damages in reconvention, is tried after the lease has expired, though there can be no judgment of rescission, yet if defendant's demand in reconvention be overruled, and the evidence shows that plaintiff would have been entitled to a judgment of rescission had the trial taken place sooner, there must be judgment in his favor for the costs. Caffin v. Scott, 205.

COURTS.

When the heirs of a succession, being of age, have accepted it unconditionally, or, being minors, have come into possession of it as beneficiary heirs after the administration has legally terminated, they must be sued in courts of ordinary jurisdiction for any debts due by the succession. C. P. 996.

Self v. Morris, 24.

2. Whenever a succession is accepted with benefit of inventory, and minors cannot accept in any other way, it must be administered as a vacant estate, under the authority of the Probate Court; and all claims against it must be sued for in that court, against the administrator appointed to settle it.

Ibid.

3. A judgment of a Court of Probates homologating the proceedings of a family meeting, and ordering certain real property belonging to minors to be mortgaged, cannot be annulled in a direct action before a District Court. Per Curium: The action should have been before the Probate Court.

Rhodes v. Union Bank, 63.

4. Sect. 14 of the act of 16 March, 1826, which provides that where the party



to whom notice is to be given, either of a final judgment or other proceeding in the City Court of New Orleans, does not reside within the jurisdiction of the court, and has no attorney in fact, or at law resident therein, execution may be issued, or other proceedings had without notice, does not apply to the citation to a defendant. *Jacobs* v. *Ducros*, 115.

- 5. Lands belonging to a succession, though situated in another parish, may be sold by the probate judge of the parish in which the succession is opened. Chancy v. Gray, 144.
- 6. District Courts have jurisdiction of an action by heirs to compel the transfer to them of stock owned by the deceased where there are no debts due by the succession. Per Curiam: Such a case is not one of those enumerated in arts. 924, 925 of the Code of Practice as coming exclusively under the power and jurisdiction of Courts of Probate, which being of limited and special jurisdiction cannot take cognizance of matters which, though relating to a succession, are not placed by law under their immediate control and jurisdiction. Le Page v. Gas Light and Banking Company, 183.
- 7. Where the judge of an inferior court refuses obedience to an order of the Supreme Court directing him to allow an appeal, he may be committed to prison until he complies with such order. State v. Williams, 252.
- 8. The Legislature having made no provision for the exercise of criminal jurisdiction by the Supreme Court, and the court having repeatedly declined to assume it, the question can no longer be considered as an open one.

Thid.

9. A Court of Probates has jurisdiction of an action against minors represented by their tutor, for property in the possession of the latter, where both parties claim under a bequest made by a common ancestor and plaintiff sues for a partition. Penny v. Christmas, 481.

DEFAULT.

See Contracts, 6, 7.

DEPOSITARY.

Where a depositary of money to be drawn upon checks or orders pays a forged check, he will be liable for the amount with legal interest from judicial demand. Etting v. Commercial Bank, 459.

DISCONTINUANCE.

Where an intervening party prays for a dissolution of an injunction obtained by plaintiff, and for interest and damages, the plaintiff cannot, by dismissing his suit, deprive the former of his right to a judgment.

Whittemore v. Watts, 10.

2. Where one of two persons designated by a testator to act as his executor in a certain event, presents a petition to the Probate Court to be confirmed as executor, and makes the other a party to the proceeding, and the latter

contests his right, and, by a reconventional demand, asserts a better right to the appointment, the former cannot, by withdrawing his petition, defeat the demand of the latter. Succession of Gourjon, 422.

DOMICIL.

See Police Juny, 2.

DONATIONS MORTIS CAUSA.

- Where one to whom property is bequeathed in case of her surviving a certain person, dies before the latter, the legacy will be without effect. C. C. 1691. Mishon v. Bein, 146.
- To ascertain the intention of the testator the different clauses of a will must be construed with reference to each other. C. C. 1705, 1706.

Thid.

3. To ascertain the intention of a testator every part of his will must be considered. The amount of his estate, the number of persons whom nature has placed so near to him as to make it his duty to attend to their wants, the situation of those who claim to be the object of his bounty, their relationship to him, and their comparative wealth or need must also be considered, where the language of the testator is uncertain.

Oxley v. Clay, 425.

4. The validity and effect of a will made and carried into execution in another State, and the kind of estate which it confers upon the legatees especially as to personal effects situated in that State, must be tested by the law of the domicil of the testator and not of the legatees.

Penny v. Christmas, 481.

5. In the construction of wills money ordered to be invested in any species of property for the purposes of a bequest, is always regarded as such property. . Money to be employed in the purchase of land is treated as land.

Ibid.

- 6. In the construction of wills the intention of the testator is the object to be ascertained, and the language used by him must be understood according to its ordinary, popular signification. Ibid.
- 7. A testator by a will executed in the State of South Carolina, where he resided, directed a certain sum "to be invested in the purchase of alaves, for the use of S. during her life, and, after her death, said slaves to return and vest forever in her sons M. and R., and the heirs of their bodies." M. and R. were in existence at the time of the devise: Held, that the object of the testator was to give a life estate to S., and, after her death, the full property to M. and R.; that such a disposition is valid by the laws of South Carolina, where the common law, modified by statutes, prevails; that by the laws of that State slaves are considered personal property; that M. and R. had an estate in remainder, to be enjoyed after the life estate of S. had terminated, but which vested in them at the creation of the particular estate; and that, on the death of S. and the termination of her estate, M. and R., or

their heirs, became entitled to the possession and enjoyment of the property as tenants in common. *Ibid*.

ERROR.

1. Plaintiffs enjoined an order of seizure and sale taken out by a creditor by judicial mortgage against a lot of ground belonging to their debtor, and on which they claimed to have an anterior special mortgage. The lot mortgaged to plaintiffs was erroneously described as being lot 2 in square No. 9, instead of lot 2 in square No. 5; but it was proved that there was no square No. 9, and the description was, in other respects, sufficient to identify the lot; Held, that the error cannot affect plaintiffs' mortgage, it not having misled the defendant, whose right resulted from the recording of a judgment operating on all the property of the debtor.

City Bank v. Denham, 39.

2. Where it is proved that plaintiffs were induced, through the misrepresentations of defendant, or his agents, to consent to accept in satisfaction of certain mortgage notes held by them an amount much below their real value, the agreement will be rescinded on the ground of error.

Hills v. Jacobs, 406.

One who alleges error as the basis of his action must show it, or show, at least, that the evidence of it is exclusively in the power of his adversary.

Union Bank v. Hyde, 418.

EVIDENCE.

- I. Onus Probandi.
- II. Presumption.
- III. Competency of Witness.
- 1V. Examination of Witness.
- V. Admissibility of Evidence.
- VI. Judicial Records and Proceedings.
- VII. Non-judicial Records.
- VIII. Private Writings.
 - IX. Proof of Contracts not in Writing, over Five Hundred Dollars in Value.
 - X. Parol Evidence to Explain, Alter or Destroy Written Instruments.
 - XI. Secondary Evidence.
- XII. Evidence of Parties.
- XIII. Evidence in Particular Actions.
 - 1. In Actions on Bills of Exchange and Promissory Notes.
 - On Appeals from decisions of Jury of Freeholders establishing a Road.

I. Onus Probandi.

- An action to annul a judgment on the ground of fraud must be brought within a year after the discovery of the fraud, (C. P. 613); and where the defendant expressly denies any discovery of fraud within that time, the plaintiff must prove it. Wheat v. Union Bank, 94.
- Where in an action for damages for the loss of a slave drowned while engaged in an illegal traffic with defendants, no evidence is introduced to show the value of the slave, no judgment can be rendered in favor of plaintiff.

Villeré v. Græter, 203.

- One who alleges error as the basis of his action must show it, or show, at least, that the evidence of it is exclusively in the power of his adversary.
 Union Bank v. Hyde, 418.
- 4. As a general rule, he who affirms must prove; but as there are many negative propositions which it would be impossible to prove directly, the burden of proof, in such cases, is thrown on the opposite party. *Ibid*.
- 5. Where plaintiff sues before maturity, on a written promise of defendant to pay him a certain amount at a future period, and introduces no proof that the amount was payable, as alleged by him, at an earlier period, he must be nonsuited. Carter v. Hodge, 433.
- 6. The fact that the thing sold remains in the possession of the vendor is a badge of fraud, and throws upon the vendee the burden of proving the reality of the sale; and this even where the vendor has reserved to himself the usufruct, or retains the possession by a prevarious title. C. C. 2456.

Merritt v. Burgess, 434.

See 8, 9, 11, infra.

II. Presumption.

- Satisfaction of a judgment may be proved by presumptions, as well as by
 positive evidence. The sufficiency of the proof must depend on the circumstances of each case. Bethany v. His Creditors, 61.
- 8. Where in an action to recover certain slaves it is proved that defendant got possession of them illegally and fraudulently, and was the last person seen in possession of them, they will be presumed to be still in his possession. The burden of proving that he has parted with the possession is on him. Drummond v. Commissioners of Clinton and Port Hudson Railroad Company, 234.
- 9. The statute of the State of Alabama of the 10th of January, 1835, which provides (s. 3) "that when any execution shall have been issued on any judgment or decree, &c., within a year and a day from the rendition of any such judgment or decree, which shall not have been returned satisfied in full, such judgment or decree shall not afterwards be presumed to be paid or satisfied, without payment or satisfaction be entered on the records of the court, &c., unless no execution shall be issued on such judgment or decree for the space of ten years," establishes a legal presumption of payment in favor of the debtor, when the creditor, after suing out, within a year and a second content of the debtor, when the creditor, after suing out, within a year and a second content of the debtor.

day from the date of the judgment, an execution which is not returned satisfied in full, remains for ten years without taking out another execution. It does not absolutely bar the right of action on such judgment, but throws on the creditor who seeks to recover on it, the burden of proving that it has not been satisfied. Succession of Tilghman, 387.

10. The effect of a legal presumption is, to relieve the party in whose favor it exists from the necessity of making any proof; but this presumption may be destroyed by proof that the fact is otherwise than the law presumes. Aliter, as to presumptions juris et de jure, against which no proof can be admitted.

Tbid.

11. Where in an action against the endorser of a note the holder relies on a promise to pay made after the endorser had been discharged by the laches of the holder, it is incumbent on him to show that the promise was made by the endorser with full knowledge that he had been so discharged. But an actual payment furnishes a presumption of indebtedness; and where an endorser seeks to recover back the amount of a note on the ground that it was paid by him in ignorance of the fact that he had been discharged, he must show that he was so discharged. Union Bank v. Hyde, 418.

See 37, infra. FRAUD, 1, 2.

III. Competency of Witness.

- 12. The second section of the act of 27 March, 1823, which declares "that no person who has made a surrender of his property for the use of his creditors, shall be admitted as a witness, except in cases of usury and unlawful contracts, in any civil suit brought either by the mass of his creditors against any of his creditors or debtors, or by any of the said debtors or creditors against the mass of the creditors of said person, on any contract, note or obligation entered into, drawn or executed, or subscribed by the said person previous to his having made a surrender of his property," is repealed by art. 3521 of the Civil Code. Art. 2169 of the Civil Code has no reference to that act. Dupeux v. His Creditors, 243.
- 13. The master and others employed in the navigation of a vessel, though servants of the owners in different grades of authority, are competent witnesses for their employers. A witness is not incompetent because he is, or has been in the employment of the party who calls him.

Randall v. Laguerenne, 327.

14. Where in an action against the maker and endorser of a note, the maker pleads that she was a married woman at the time of executing the note, which was signed by her as surety for her husband, and that she was in no way benefitted by the consideration received therefor, and the endorser answers separately but adopts the defence set up by his co-defendant, he cannot be examined as a witness for the latter to establish the facts alleged in her answer, being interested in destroying her obligation as maker.

Macarty v. Roach, 357.

15. The endorser of a note is a competent witness for the maker where the

facts attempted to be proved by his testimony have no tendency to affect his responsibility, nor to change, as to him, the ultimate result of the sait.

Itid.

- 16. The act of 27 March, 1923, so far as it renders the maker of a note, bill of exchange, or other negotiable paper incompetent, under any circumstances, in any action by the holder against an endorser, was repealed by article 3521 of the Civil Code. *Ibid*.
- 17. A father is incompetent as a witness for his illegitimate child. C. C. 2260. Per Curiam: The mere fact of a witness being the ascendant of the party for or against whom he is called, is sufficient to render him incompetent. The law makes no distinction as to fathers by legal marriage or otherwise.
 Thid

IV. Examination of Witness.

18. A witness, under cross-examination, may state matters which, though not directly called for by the question propounded to him, might be brought out by a direct question from the other side.

Cross v. Police Jury of Lafourche Interior, 121.

V. Admissibility of Evidence.

19. Defendant sued on a note which she alleged to be counterfeited, objected to its being produced in evidence by plaintiff, without his being first required to account for erasures and other defects apparent on its face. The court being unable to say whether there were such erasures and blemishes as should authorize the exclusion of the note till explained or accounted for, permitted the note to go to the jury; Held, that the matter in controversy being specially within the province of the jury, the note was, under the circumstances, properly submitted to their consideration.

Dawson v. Dawson, 36.

- 20. In an action against the curator to recover an amount due by the deceased, plaintiff alleged that the latter had been very careful in keeping his accounts, and that evidence of her demand would be found on his books, or among his papers: Held, that this allegation does not show that the demand was founded on a written contract, nor compel the petitioner to admit the books and papers of the deceased in evidence. Succession of Segond, 111.
- 21. In an action against the owners of a steamer to recover the value of property shipped on their boat, and not delivered pursuant to the bill of lading, where the defence is that the property was lost in consequence of a collision with another boat, without defendants' fault, evidence is admissible to show that the property was lost in consequence of the collision, without any fault or negligence on the part of defendants or their agents, and that the accident was unavoidable. Per Curiam: If there was no fault or carelessness on the part of the defendants or their agents, and it was out of their power to prevent the collision, the accident must be considered unavoidable

and one of the dangers of the river within the meaning of the bill of lading, for which the carriers are not responsible. C. C. 2725.

Van Hern v. Taylor, 201.

22. In an action for a balance due for labor and materials, an account proved to have been furnished by plaintiff to defendant, may be offered in evidence by the latter, though not in the hand-writing of plaintiff; but the plaintiff may introduce evidence to destroy its effect. Donaldson v. Walker, 329.

See 41, 45, 46, infra. Roads, 2.

VI. Judicial Records and Proceedings.

23. A judgment pronounced in another State by a court of competent jurisdiction, against an administrator appointed to represent a defendant, who died pendente lite, and after answering, ascertaining the balance due by the deceased on the settlement of a partnership, in the absence of any proof that such judgment is not as valid by the laws of the State in which it was pronounced as if rendered against the heirs themselves, is prima facie evidence against the succession in this State, and sufficient to support a judgment by default. Const. U. S. art. 4, s. 1. C. P. 122. Per Curiam: We are not prepared to say, that it is conclusive against the heirs or executor here.

Tait v. Lewis, 206.

- 24. A judgment rendered in another State, properly authenticated, must have the same force and effect here as in the State in which it was rendered; but it can have no greater effect. Thus, where by the laws of the State in which a judgment was rendered, it will be presumed to have been paid in case no execution be issued thereon within a certain time, such presumption will attach to the judgment, and exist in favor of the debtor in an action on the judgment in this State. Succession of Tüghman, 387.
- 25. Complete mutuality or identity of all the parties is not necessary in order to admit depositions of an absent witness taken in a former suit. It is generally sufficient if the matters at issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness. Clossman v. Barbancey, 438.

See 35, 36, infra.

VII. Non-Judicial Records.

- 26. The certificate of a Recorder of Mortgages that no mortgage existed on a lot of ground offered for sale by a Sheriff, is entitled to no weight, in opposition to authentic evidence showing that a mortgage really existed on the property. City Bank v. Denham, 39.
- 27. Where an authentic act of sale contains an absolute assumption by the purchaser of a debt due by the vendor to a third person, a paper signed by the vendor, declaring that the assumption was not an absolute one, will be inadmissible against such third person to disprove the absolute character of the assumption, unless the fact be sworn to. McMichael v. Davidson, 53.

VIII. Private Writings.

28. Where the real date of an act sous seing privé is not proved aliunde, it will date as to third persons, only from the day of its production in court.

McMichael v. Davidson, 53.

IX. Proof of Contracts not in Writing over Five Hundred Dollars in Value.

- 29. All contracts, not in writing, for the payment of any amount exceeding five hundred dollars, must be proved at least by one credible witness, and corroborating circumstances. C. C. 2257. Succession of Segond, 111.
- 30. A promise by an endorser to pay the amount of a bill exceeding five hundred dollars, made after protest, is an agreement to pay money, which, under art. 2257 of the Civil Code, must be proved by one credible witness, and other corroborating circumstances appearing aliunde.

Mechanics and Traders Bank v. Walton, 451.

X. Parol Evidence to Explain, Alter or Destroy Written Instruments.

- 31. Where, by a written agreement entered into at the time of dissolving a partnership, one of the partners who purchased the common stock bound himself to pay all the partnership debts, parol evidence will be inadmissible to prove a guaranty by the other partner, that the debts did not exceed a certain amount. C. C. 2256. Lynch v. Burr, 96.
- 32. A married woman, whether separated in property or not, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him during the marriage, (C. C. 2412); and when sued on such a contract, she may show by parol evidence, that she was only a surety, though such evidence expressly contradict her own declarations in an authentic act.

Macarty v. Roach, 357.

33. In an action on a written lease defendant may introduce parol evidence to show that plaintiff had consented, prior to the expiration of the lease, that a third person should occupy the premises as his tenant. Per Curiam:

The testimony does not contradict the written lease, but only shows a subsequent agreement in relation to it. Cunxingham v. Caldwell, 520.

XI. Secondary Evidence.

34. Plaintiffs offered in evidence a paper proved by a witness to be a copy made by him at the request of one of the defendants from the original handed to him by the latter for that purpose, and which, with the original, had been returned to the defendant. Plaintiffs, having made oath that they had seen the original in possession of one of the defendants, notified the latter to produce the original. Two of the defendants answered that they had no such paper in their possession, nor had ever seen it, and that their co-defendant was absent, and moved for a continuance on the ground of surprise. Held, that the absence of the defendant to whem the original had been delivered

was no ground for a continuance, and that the absence of the original was sufficiently accounted for to authorize the admission of the copy.

Hills v. Jacobs, 406.

35. Proceedings under a rule, not connected with the suit, taken by plaintiff against defendant and yet under advisement, are inadmissible in evidence, where it is not shown that the witnesses examined on the rule are absent, or that their attendance cannot be procured.

Clossman v. Barbancey, 438.

XII. Evidence of Parties.

36. A deposition made by a party in an action which he had brought as a syndic, is admissible in evidence in an action in which he is sued both individually and as syndic. Per Curiam: Extra-judicial statements made by the defendant would be good evidence in support of a personal demand against him; a fortiori, his testimony taken in open court should be received. How far such testimony is to affect those whom he represents as syndic is a question which goes more to the effect, than to the admissibility of the evidence. Clossman v. Barbancey, 438.

XIII. Evidence in Particular Actions.

- , 1. In Actions on Bills of Exchange and Promissory Notes.
- 37. Where a notary certifies in his protest that he demanded payment of a note at the place at which it was payable, though he does not state that he took the note with him or presented it for payment, it is sufficient. Per Curiam: The person making a presentment or demand must have with him the bill or note he is charged to collect; but the presumption is that the notary did his duty, until the contrary be shown. Harbour v. Taylor, 32.
- 38. Where a notary states in his protest of a note, "that he demanded payment of the note of the cashier" of the bank, at which it was payable, at the bank, "who answered that it could not be paid, there being no funds in bank for that purpose," it is sufficient. On an objection that there was no evidence that the notary presented the note to the cashier: Held, that the latter having said there were no funds to pay the note, no presentation was necessary. Union Bank v. Lea, 75.
- 39. The certificate of a notary, though without a date, is legal evidence to show the manner in which the notice of protest to the endorser of a note was served or forwarded. Its insufficiency, from the want of a date, to establish the diligence used in serving the notice, is no reason why it should not be received so far as it goes. Act 13 March, 1827, § 1. It is evidence of all the matters therein stated, and other evidence may be introduced to show a complete compliance with all the requisites of the law. The testimony of the notary may be used to establish the date of the certificate and notice: such evidence, not contradicting, but merely supplying an omission in the certificate. Per Curiam: It might, perhaps, be otherwise, if the evidence was intended to contradict the certificate.

Union Bank v. Penn, 79.

- 40. The statute of 13 March, 1827, which authorizes the certificate of the notary by whom a note or bill has been protested, to be used as evidence of the manner in which the demand was made, and notices of protest served, introduced a new mode of proof of the facts therein stated; but it does not preclude a party who may not choose to resort to it, from producing parol evidence of such facts. Ibid.
- 41. A notary cannot be examined as a witness to contradict a statement made by him in a protest. Per Curiam: A public officer, who has given a certificate in his official character, cannot be listened to as a witness to prove it false. Peet v. Dougherty, 85.
- 42. A promise to pay a bill, made by an endorser who has been discharged by the laches of the holder, to be binding, must have been made with full knowledge of such laches, and with the intention of waiving his legal rights. Direct proof of such knowledge is not required; it may be inferred from circumstances attending the promise. Heath v. Commercial Bank, 334.
- 43. Where on an appeal from a judgment confirming one taken by default against an absent defendant as endorser of a bill of exchange, the record shows that no evidence was introduced to establish the agency of the person on whom the citation was served, nor to prove the signature of the defendant or a demand and notice of protest, the judgment must be reversed.

Mechanics and Traders Bank v. Walton, 451.

44. The testimony of a witness that he gave defendant legal and timely notice of the protest of a bill, is insufficient to prove notice. Per Curiam: A notary, or other person called to prove a notice of protest, must state the time, manner, and circumstances under which the notice was given, that the court may judge of its sufficiency. He is not to take upon himself to decide upon its sufficiency. Ibid.

See 14, 15, 16, 19, 30, supra.

- 2. On Appeals from decisions of Jury of Freeholders establishing a Road.
- 45. On an appeal from the decision of a jury of freeholders establishing a road through the lands of the appellant, defendants offered in evidence a petition addressed to them by the former, at a previous period, with parel evidence to show the action on it, and the selection by the appellant, of the route to which defendants consented in their answer: Held, that the evidence was admissible; and that if there had been any change in the property, or in circumstances, calculated to alter his opinion, it was competent for him to show it, and thereby destroy the effect of the evidence.

Cross v. Police Jury of Lafourche Interior, 121,

46. On an appeal from the decision of a jury of freeholders establishing a road, under the act of 12 March, 1818, the appellant may introduce evidence to prove that a convenient and good road may be laid out through his lands, less injurious than the one proposed by the jury, though such route was not specially indicated in his opposition. So, evidence will be admissible on his part to show, that the construction of the road along another route

would cost less than the one designated by the defendants, the law giving to the court and jury to whom the appeal is submitted, a power of revision over the damages as well as the course of the road. *Ibid*.

EXCEPTION.

See Pleading, 19, 20, 21.

EXECUTION OF JUDGMENT.

- I. Seizure under a Fi. Fa.
- II. Effect of Seizure and Privilege on Things Seized.
- III. Sale of Things Seized.
- IV. Interrogatories to Third Persons under a Fi. Fa.

I. Seizure under a Fi. Fa.

- A seizure under a fi. fa. of property of a debtor made after a petition has been presented for a forced surrender under the act of 1808, is illegal. Act of 25 March, 1808, s. 20. Jacobs v. Bogart, 162.
- 2. A judgment creditor cannot treat a conveyance made by his debtor as null and seize the property so conveyed, in the possession of a third person. If the conveyance be illegal or void, he must sue such third person to annul it. Drummond v. Commissioners of Clinton and Port Hudson Railroad Company, 234.
- 3. Where the return made by an officer on a fi. fa. recites that his predecessor had seized in the hands of A. in his capacity of sheriff, certain notes or bonds, but they were not actually seized and taken into possession by the officer, but were kept by A. and subsequently handed over to his successor in office, there is no legal seizure. Per Curiam: The officer should have taken the notes or bonds into his possession, or at least, have called upon A. for their delivery, when, in case of his refusal, the plaintiff, so long as a fi. fa. remained in the hands of the officer, would have been entitled to his remedy under sect. 13 of the statute of 20th March, 1839.

Simpson v. Allain, 500.

- 4. To make a legal and valid seizure of tangible property, in the hands of a debtor or of a third person, by which the seizing creditor may acquire a privilege on the thing seized, the sheriff must take the object into his posession. The 10th sect. of the statute of 10th February, 1841, provides for the only exception to this rule where the property is in the possession of one of the sheriffs created by it under a previous seizure. Ibid.
 - II. Effect of Seizure and Privilege on Things Seized.
- 5. All the privileges and mortgages existing on property sold under execution, where the debtor has no other property to pay his debts, are transferred from the property to its proceeds, the distribution of which must be made as

in case of a concurso. C. P. 301, 401, 402. 403. And where a balance of the proceeds of property sold under execution, remaining after satisfying the plaintiff's claim, is seized under a f. fa. by a third person, the latter can acquire no greater right than if he had seized the property itself.

Fulton v. Her Husband, 73.

- 6. A wife has a general legal mortgage on the lands and slaves of her husband for the reimbursement of her paraphernal funds received and used by the latter; and where her mortgage existed before a seizure and sale of such property under a fi. fa. at the suit of a creditor of the husband, she will be entitled to be paid by preference out of the proceeds, unless the seizing creditor prove that the husband has other property sufficient to satisfy her claim. C. P. 401, 403. Willis v. Her Husband, 67.
- 7. So long as money received under an execution has not been paid to the seizing creditor, it is not too late to set up claims entitled to be paid by preference out of the amount. The money represents the property of which it is the proceeds, and is subject to the privileges and mortgages which existed on it. C. P. 401, 402, 403. *Ibid.*
- 8. No appeal will lie from a judgment setting aside a seizure of the property of an insolvent, made under a fi. fa., issued after the commencement of the insolvent proceedings. Per Curian: The judgment works no irreparable injury. It does not deprive the party of any advantage he may have gained by the seizure, which may be claimed on the filing of the tableau of distribution. Its only effect is to place the property in the hands of the syndic to be administered. Jacobs v. Bogart, 162.

III. Sale of Things Seized.

- 9. A purchaser at a judicial sale of property on which there exists a general mortgage, judicial or legal, against whom an action has been commenced, or who has good reason to fear that an action will be commenced against him by the mortgagee, may withhold the price until relieved from such apprehension, or until proper security be given against the danger of eviction. C. P. 710. Fortier v. Slidell, 398.
- 10. The statement by a sheriff in an act of sale, that the property is sold subject to a general mortgage made in compliance with the provision of the Code of Practice, art. 693, § 6, can impose no obligation on the purchaser to which he is not subjected by law. Per Curiam: A sheriff has no authority of his own to impose any burden on a purchaser beyond the provisions of the law. Purchasers at sales under execution, are not personally bound for anterior general mortgages existing on the property purchased by them. They are only liable to an hypothecary action. C. P. 679, 683, 693, 710.
- 11. Where a purchaser at a judicial sale refuses to pay the amount of a special mortgage, which formed a part of the price and had been left in his hands at the time of the sale, on the ground of the danger of eviction, and the property is resold at the suit of the special mortgagee, the first sale becomes null and void. Ibid.



- 12. The Code of Practice does not provide for the erasure of mortgages subsequent or inferior to that of the suing creditor, where any surplus remains after paying his anterior, special mortgage. Art. 707 directs, that if any surplus remain after paying the suing creditor, the purchaser shall apply it to the payment of any subsequent special mortgages existing on the property; but there is no provision for a case in which the subsequent mortgages are not special, but general. In such a case, the purchaser being bound for nothing beyond the price of the adjudication, has a right, on paying that price, to have the property cleared of all encumbrances subsequent to that of the suing creditor; and as he cannot safely take upon himself to decide to which of the subsequent general mortgages the balance in his hands is to be applied, the institution of an action against the mortgagees to compel them to establish their respective rights to the surplus in his hands, and to show cause why, upon depositing such surplus subject to the order of the court, their respective mortgages should not be cancelled, is a safe and proper course for him to pursue. Ibid.
- 13. No adjudication can be made of property subject to special mortgages of an older date than that of the mortgages at whose suit it is offered for sale, unless the price bid exceed the amount of the anterior mortgages. C. P. 684. Hills v. Jacobs, 406.
- 14. Where a bidder for property offered for sale at the suit of a mortgagee refuses to pay the price bid by him, on the ground that a mortgage held by him is entitled to a preference over that of the seizing creditor, and the sheriff in consequence refuses to complete the sale, the bidder cannot afterwards insist upon the sale as valid. Ibid.
 - IV. Interrogatories to Third Persons under a Fi. Fa.
- 15. The remedy given by sect. 13 of the act of 20th March, 1839, is applicable only where the plaintiff has applied for a writ of fi. fa.

Simpson v. Allain, 500.

See Evidence, 9.

EXECUTOR

See Successions, II.

EXECUTORY PROCESS.

1. Plaintiff having obtained an order directing defendants to sell for each certain property mortgaged to him, subsequently took a rule on the latter to show cause why they should not be punished as for a contempt for disobeying the order of sale. There was no opposition to the order of sale, nor was any appeal taken from it. Defendants in answer to the rule, having alleged their willingness to comply with the order, but suggesting that the sale eight not to be made for each, the court directed it to be made on the

terms suggested by the defendants: Held, that the court had no authority to set aside its first judgment but on a regular opposition.

State v. Atchafalaya Railroad and Banking Company, 447.

2. Under the 24th sect. of the act of the 1 April, 1833, incorporating the Citizens Bank of Louisiana, which provides "that all property mortgaged to the bank for any purpose, may be seized and sold, at any time, according to law, in whosoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession by succession or descent to heirs or legatees by last will and testament, or otherwise, in the same manner as if the same was in possession of the original mortgagor," the bank may obtain from a court of ordinary jurisdiction an order of seizure and sale against property mortgaged to it, though in possession of the executor of the mortgagor, on notifying the latter is order to give him an opportunity by paying the mortgage debt, to avoid being disturbed.

Citizens Bank v. Buisson, 506.

FAMILY MEETING.

See MINOR, 7.

FATHER AND CHILD.

A father is incompetent as a witness for his illegitimate child. C. C. 2260.

Per Curiam: The mere fact of a witness being the ascendant of the party for or against whom he is called, is sufficient to render him incompetent. The law makes no distinction as to fathers by legal marriage or otherwise.

Macerty v. Roach, 357.

FRAUD.

- In the case of a mortgage or deed of trust, the possession of the property by the mortgagor or debtor, until the sale, is not inconsistent with the deed, and raises no presumption of fraud. Layson v. Rowan, 1.
- The fact that one of the parties for whose benefit a deed of trust was executed by an insolvent, in another State, is a son of the debtor, does not authorize the conclusion, in the absence of other proof, that the debt is fraudulent. Ibid.
- 3. Action to annul a judgment on the ground of fraud on the part of the plaintiff in claiming more than he was entitled to recover. There was no proof at what time the alleged fraud was discovered: Held, that in the absence of evidence that the fraud was discovered since the date of the original judgment, prescription must be considered to have commenced from the date of the judgment; and that the action is prescribed by one year from that time.

 Farrar v. Peyroux, 92.
- 4. An action to annul a judgment on the ground of fraud must be brought within a year after the discovery of the fraud, (C. P. 613); and where the de-Vol. VII.

fendant expressly denies any discovery of fraud within that time, the plaintiff must prove it. Wheat v. Union Bank, 94.

5. The fact that the thing sold remains in the possession of the vendor is a badge of fraud, and throws upon the vendee the burden of proving the reality of the sale; and this even where the vendor has reserved to himself the usufruct, or retains the possession by a precarious title. C. C. 2456.

Merritt v. Burgess, 434.

FREEDOM, SUIT FOR.

See SLAVE.

HUSBAND AND WIFE.

- 1. Plaintiff having recovered judgment against defendant, who was in community with his wife, caused a fi. fa. to be levied on certain lots of ground. which were purchased by A. at twelve months credit, who gave his bond for the price. Defendant subsequently made a surrender to his creditors; and plaintiff afterwards proceeded against the purchaser, under the 13th section of the act of 20 March, 1839, propounding interrogatories to him to ascertain whether he had property in his possession or under his control belonging to defendant, in which proceedings the syndic of defendant's creditors intervened, claiming the property as belonging to the insolvent's estate, The perchaser answered, that he was requested by defendant's wife to purchase the property for her; and that he purchased the property, taking the title in his own name, but considered himself bound to make her a title therefor, provided the price be paid to him when the bond matures, and not The court, before which the proceedings under the act of 1839 were instituted, considered the purchase to have been made for the benefit of the community, and decreed the property to belong to the syndic, by whom it was sold, and purchased by plaintiff. Before the bond matured, defendant's wife obtained a judgment of separation of property, and, on the day of its maturity, tendered the price to A., demanding a conveyance of the lots. In an action by plaintiff to recever the property: Held, that the wife, not being a party to the proceedings under the act of 1839, the judgment in favor of the syndic does not conclude her; that though the community existed at the time of the purchase by A., yet that, at the maturity of the bond when the conveyance was to be made to the wife on her paying the price, she was separated in property, and capable of acquiring property for herself, independently of her husband; that the title was suspended, remaining in A., liable to be divested, on the performance of the condition, at the maturity of the bond; and that the fact that the wife was capable of acquiring at the expiration of the time limited, sufficed to make the contract valid, and to give her a good title to the property, independently of her husband, on her compliance with the conditions of the agreement. Lallande v. Terrell, 67.
- No period is fixed by the Civil Code, within which a wife, who has obtained a judgment of separation of property, must commence proceedings under

her judgment. It requires only that there shall be a bona fide non-interrupted proceeding to obtain payment. Where a judgment of separation was obtained on the 3d of July, and duly advertised, but no execution was issued till the 28th of October following, the delay is not such as to deprive the wife of the right of enforcing her claim against her husband, and to render her judgment null, especially where no right has been acquired in the mean time, by any third person. C. C. 2402. Fulton v. Her Husband, 73.

- 3. Plaintiff having sold a tract of land before her marriage, received certain notes for the price. The notes matured after her marriage, when, the purchaser being unable to pay, agreed to rescind the sale, and on receiving his notes, reconveyed the property to the plaintiff. She subsequently resold the property to a third person, her husband assisting in the sale, and receiving the price. Held, that the re-transfer made to the plaintiff by the first purchaser, cannot be viewed as a purchase made during the marriage; that the land became the property of the petitioner, in the same manner as if the first sale had been judicially rescinded; that she held it by the title she had before her marriage, as though no sale had been made; and that, consequently, it never belonged to the community. Ibid.
- 4. A wife has a general legal mortgage on the lands and slaves of her husband for the reimbursement of her paraphernal funds received and used by the latter; and where her mortgage existed before a seizure and sale of such property under a f. fa. at the suit of a creditor of the husband, she will be entitled to be paid by preference out of the proceeds, unless the seizing creditor prove that the husband has other property sufficient to satisfy her claim. C. P. 401, 403. Willis v. Her Husband, 87.
- 5. Though a minor who has been emancipated by marriage become a widow before the age of twenty-one, she will not return to the state of pupilage.
 Wilcox v. Henderson, 328.
- 6. A married woman, whether separated in property or not, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him during the marriage, (C. C. 2419): and when sued on such a contract, she may show by parol evidence, that she was only a surety, though such evidence expressly contradict her own declarations in an authentic act.

Macarty v. Roach, 357.

- The mortgage which the wife has on the property of her husband for her dotal rights, is not required to be recorded. C. C. 3298. It secures the amount of such property, with legal interest from the dissolution of the community. Fortier v. Slidell, 398.
- 8. Although the distinct interest of the wife, or of her representatives, attaches at the time of the dissolution of the marriage, subject to the right to renounce and be exonerated from the payment of the community debts, they can claim nothing from the community until such debts are paid. No action can be maintained by them for the half of the price of any specific property acquired during the marriage, where it is not shown, by a liquidation of the community, that there are any gains to be divided. 1bid.

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HYPOTHECARY ACTION.

See EXECUTORY PROCESS.

ILLEGITIMATE CHILD. See Father and Child.

INDICTMENT.

- 1. The first section of the statute of 29 January, 1817, forbidding the introduction into this State of slaves convicted of certain crimes, and denouncing a fine of five hundred dollars for every slave brought into the State in violation of its provisions and the forfeiture of the slave, one-half for the use of the State and the other half for the use of the informer, creates an indictable offence; and where the proceedings against one charged with a violation of the statute were by indictment, no appeal will lie from a sentence pronounced on the verdict of a jury, declaring the slaves so imported to be forfeited, and condemning the offender to pay the fine imposed by the statute and the costs, and to stand committed until they are paid. State v. Williams, 252.
- 2. By the common law every act contra bonos mores, is an indictable offence; but no such mass of undefined offences exists in this State. Nothing is punishable here which is not made an offence and the punishment denounced by legislative authority; but whatever constitutes an offence against the public by act of the Legislature may be prosecuted by indictment, unless a different mode of proceeding be expressly provided for. 'Ibid.

INJUNCTION.

- After a motion to dissolve an injunction, plaintiff carnot, by filing an amended petition containing new allegations, cure a radical defect in his original proceedings, and thereby give effect to an injunction originally illegal.
 Rhodes v. Union Bank. 83.
- 2. A sheriff who pays over money in violation of an injunction served upon him, will be responsible to the plaintiff in the injunction for the amount.
- Rundall v. Parkison, 134.

 3. Where an injunction has been obtained to prevent defendant from obstructing the petitioner in the free use of a common passage way, on proof that the obstruction which existed at the time the injunction was sued out has not been removed, the court may order it to be removed at once by the Sheriff, without waiting for a trial on the merits.

McDonogh v. Calloway, 442.

4. An injunction may be directed to parties or to public officers to compel them to do certain acts, as well as to restrain them from acting. It is as effective to enforce a right as to prevent a wrong. Thus an injunction may issue to compel the removal of an obstruction in a commen way. C. P. 248. Ibid.

INSOLVENCY.

- In the State of Mississippi, in which the common law prevails, a debtor, though insolvent, may, by a deed of trust, grant a preference to a part of his creditors; and, having a right to determine which of them shall be paid, he may dictate the terms of payment. Layson v. Rowan, 1.
- The fact that one of the parties for whose benefit a deed of trust was executed by an insolvent, in another State, is a son of the debtor, does not authorize the conclusion, in the absence of other proof, that the debt is fraudulent. Ibid.
- 3. No re-inscription of a mortgage is necessary, where the mortgagor has made a surrender of his property and obtained a stay of proceedings. C. C. 3326. Per Curiam: The rights of the creditors of an insolvent must be acted on with reference to their situation when his bilan was filed, and all proceedings against him stayed. Bethany v. His Creditors, 61.
- 4. All actions pending, and all claims against one who has made a forced surrender under the statute of 25 March, 1808, for the relief of insolvent debtors in actual custody, must be removed to, and cumulated in the tribunal before which the insolvent proceedings are pending.

Jacobs v. Bogart, 162.

- 5. No security is required by the statute of 25 March, 1808, relative to insolvent debtors, from syndics appointed under the provisions of that act. The first section of the act of 13 March, 1837, is the only law requiring syndics to give security, and it relates exclusively to insolvent proceedings in cases of the voluntary surrender of property under the statute of 20 February, 1817. The statute of 1817 does not apply to forced surrenders. The two modes of surrender are distinct, and governed by different laws. Ibid.
- 6. Where a creditor who has been placed on the schedule of an insolvent, and made a party to the proceedings for a forced surrender under the act of 1808, does not prove his debt, nor make any opposition in the lower court to the discharge of the insolvent from his debts, it will be too late to oppose his discharge on an appeal. Ibid.
- A seizure under a fi. fa. of property of a debtor made after a petition has been presented for a forced surrender under the act of 1808, is illegal. Act of 25 March, 1808, s. 20. Ibid.
- 8. No appeal will lie from a judgment setting aside a seizure of the property of an insolvent, made under a fi. fa., issued after the commeacement of the insolvent proceedings. Per Curiam: The judgment works no irreparable injury. It does not deprive the party of any advantage he may have gained by the seizure, which may be claimed on the filing of the tableau of distribution. Its only effect is to place the property in the hands of the syndic to be administered. 1bid.
- 9. A debtor committed to prison, under the provision of the sixth section of the act of 28 March, 1840, for refusing to comply with a judgment ordering him to file a schedule or statement of his affairs as required by the fifth section of that act, cannot be discharged from imprisonment on the ground, that the amount required by the act of 17 March, 1820, to be paid weekly to the



keeper of the jail, for the use of a debtor confined on mesne process, or under execution, has not been advanced for his use. Ex parte Powell, 240.

- 10. The second section of the act of 27 March, 1823, which declares "that no person who has made a surrender of his property for the use of his creditors, shall be admitted as a witness, except in cases of usury and unlawful contracts, in any civil suit brought either by the mass of his creditors against any of his creditors or debtors, or by any of the said debtors or creditors against the mass of the creditors of said person, on any contract, note or obligation entered into, drawn or executed, or subscribed by the said person previous to his having made a surrender of his property," is repealed by art. 3521 of the Civil Code. Art. 2169 of the Civil Code has no reference to that act. Dupeux v. His Creditors, 243.
- 11. Where a father, who while solvent, had made advances to some of his children upon their hereditary shares in his succession but not as extra portions, dies insolvent, his estate, so far as his forced heirs are concerned, must be considered as consisting only of the advances so made, and the disposable portion must be calculated on their amount. But the creditors of the deceased have no right to look to such advances for the payment of their claims as the amounts so advanced did not belong to their debtor at the time of his death. Grandchamps v. Delpeuck, 429.

INSURANCE.

 Policies of insurance against fire are personal contracts with the assured, and do not pass to an assignee or purchaser without the consent of the insurers. The transfer of the policy is equivalent to a new contract of insurance with the transferree.

Leavitt v. Western Marine and Fire Insurance Company, 351.

2. Where a policy of insurance provides that, "in case the insured have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in, or endorsed on this instrument, or otherwise acknowledged by them in writing, this insurance shall be void;" and a third person, to whom the property insured had been assigned and to whom the policy was transferred with the assent of the insurers, fails to notify the latter at the time of the transfer of another policy previously taken out by him on the same property, the insurers will be discharged. A declaration of the first insurance made after the loss, in compliance with a condition of the policy requiring all persons insured sustaining any loss, to declare on oath whether any and what other insurance has been made on the same property, will be too late. Ibid.

INTEREST.

- A minor is entitled to legal interest on the amount ascertained to be due to her by her tutor, from the date of the judgment ascertaining the amount so due. C. C. 353. Aubic v. Gil, 50.
- 2. Plaintiff cold defendants a tract of land, for the price of which notes were

taken bearing interest, at a certain rate, from date until paid. The land was subject to a mortgage in favor of a third person, and it was stipulated in the act of sale, that the notes should remain with a depositary until the vendor should cause the mortgage to be released, and that the notes should not be payable until such release. It was admitted that the land was capable of producing revenue by heing rented. There was no attempt by the purchasers to relieve themselves from interest by depositing the price. Held, that the purchasers knowing that the notes were not to be paid until the release of the mortgage, and having consented that interest should run from the date of the contract until payment, the interest must be paid as part of the consideration of the sale. Erwin v. Greene, 175.

- 3. Where real estate, capable of producing revenue, is sold for a price payable at a fixed period, and the note of the purchaser is taken for the price, without any stipulation as to interest, but subject to the condition that the note shall remain on deposit, and the payment not be demandable until the vendor shall release a mortgage existing on the property, and the purchaser has possession and enjoyment of the thing sold, legal interest will be due on the price of the property from the time when the principal was payable. C. C. 1933, 2531. Though entitled to suspend the payment of the price until the mortgage be released, the purchaser could only avoid the payment of interest by depositing the price. C. C. 2537. Ibid.
- 4. Action against defendants, who had guarantied plaintiffs against any loss they might sustain as sureties on bonds for the payment of duties, to recover the amount of certain bonds which they had been compelled to pay, with interest. Held, that plaintiffs were entitled to recover the amount of the bonds paid by them, with interest thereon at six per cent from the time of such payment. Act of Congress of 2 March, 1799, § 65.

Toole v. Durand, 363.

5. A stipulation in an act of sale that the purchaser may postpone the payment of the principal for a certain time, on paying interest at six per cent annually in advance, is not usurious or illegal. Bacchus v. Moreau, 539.

INTERPRETATION.

To ascertain the intention of the testator the different clauses of a will must be construed with reference to each other. C. C. 1705, 1706.

Mishon v. Bein, 146.

See Constitution of the United States. Successions, 15.

INTERVENTION.

See PLEADING, VI.

JUDGMENT.

 A judgment of nonsuit, or one rendered in a case in which the parties are not the same, cannot support the ples of res judicata. Gilbert v. Burg, 15.

- 2. To support the plea of res judicata the cause of action must be the same in the two suits. Noble v. Cooper, 44.
- 3. A judgment of a Court of Probates homologating the proceedings of a family meeting, and ordering certain real property belonging to minors to be mortgaged, cannot be annulled in a direct action before a District Court. Per Curiam: The action should have been before the Probate Court.

Rhodes v. Union Bank, 63.

4. Action to annul a judgment on the ground of fraud on the part of the plaintiff in claiming more than he was entitled to recover. There was no proof at what time the alleged fraud was discovered: Held, that in the absence of evidence that the fraud was discovered since the date of the original judgment, prescription must be considered to have commenced from the date of the judgment; and that the action is prescribed by one year from that time.

Farrar v. Peyroux, 92.

- 5. An action to annul a judgment on the ground of fraud must be brought within a year after the discovery of the fraud, (C. P. 613); and where the defendant expressly denies any discovery of fraud within that time, the plaintiff must prove it. Wheat v. Union Bank, 94.
- 6. A judgment of nonsuit can, in no case, support the plea of res judicata. The fact that the costs of the action in which a judgment of nonsuit was rendered are unpaid, is only ground for a dilatory exception to protect the defendant from a second action before the costs of the first are paid. But where one claiming property seized under a fi. fa. against a third person, opposes the sale, and the judge, without deciding on the merits of the opposition, merely decrees that the costs of it shall be paid by the opponent, the payment of the costs is a condition precedent to his filing a second opposition, but not to an action by him in another court, against the purchaser at the sheriff's sale, for the restitution of the property and for damages for its detention. C. P. 536. Mills v. Webber, 108.
- Citation in an action of nullity must be served on the defendant himself, or the suit will be dismissed.
 C. P. 610. Service on the attorney of the defendant in the action in which the judgment sought to be annulled was rendered, is insufficient. Jacobs v. Ducros, 115.
- 8. A judgment pronounced in another State by a court of competent jurisdiction, against an administrator appointed to represent a defendant, who died pendente lite, and after answering, ascertaining the balance due by the deceased on the settlement of a partnership, in the absence of any proof that such judgment is not as valid by the laws of the State in which it was pronounced as if rendered against the heirs themselves, is prima facie evidence against the succession in this State, and sufficient to support a judgment by default. Const. U. S. art. 4, § 1. C. P. 122. Per Curiam: We are not prepared to say, that it is conclusive against the heirs or executor here.

Tait v. Lewis, 206.

9. Mortgages acquired by third persons under the faith and protection of a decree of a court of competent jurisdiction, which has never been annulled, or-

dering the erasure of a previous mortgage, must be respected. Third persons are not bound to look beyond such a decree.

Guesnon v. His Creditors, 382 Dumas v. Guesnon, 518.

- 10 An action on a judgment obtained in another State is prescribed only by the lapse of twenty years, where the judgment creditor resides out of this State. C. C. 3508. Succession of Tilghman, 387.
- 11. The statute of the State of Alabama of the 10th of January, 1835, which provides (s. 3) "that when any execution shall have been issued on any judgment or decree, &c., within a year and a day from the rendition of any such judgment or decree, which shall not have been returned satisfied in full, such judgment or decree shall not afterwards be presumed to be paid or satisfied, without payment or satisfaction be entered on the records of the court, &c., unless no execution shall be issued on such judgment or decree for the space of ten years," establishes a legal presumption of payment in favor of the debtor, when the creditor, after suing out, within a year and a day from the date of the judgment, an execution which is not returned satisfied in full, remains for ten years without taking out another execution. It does not absolutely bar the right of action on such judgment, but throws on the creditor who seeks to recover on it, the burden of proving that it has not been satisfied. Ibid.
- 12. A judgment rendered in another State, properly authenticated, must have the same force and effect here as in the State in which it was rendered; but it can have no greater effect. Thus, where by the laws of the State in which a judgment was rendered, it will be presumed to have been paid in case no execution be issued thereon within a certain time, such presumption will attach to the judgment, and exist in favor of the debtor in an action on the judgment in this State. *Ibid*.
- 13. Where a statute declares that a judgment shall be presumed to have been paid, in case no execution be sued out within a certain period after it was rendered, the period must be calculated from the date of the judgment, though anterior to the passage of the act, and though sufficient time have not elapsed since its enactment to establish the presumption if calculated from that time.

Ibid.

- A judgment is inchoate only, and no appeal lies from it, until signed by the judge. Mechanics and Traders Bank v. Walton, 451.
- 15. To support the plea of res judicata, the parties to the two suits and the question presented must be the same.

State v. Atchafalaya Railroad and Banking Company, 447.

16. Plaintiff having obtained an order directing defendants to sell for cash certain property mortgaged to him, subsequently took a rule on the latter to show cause why they should not be punished as for a contempt for disobeying the order of sale. There was no opposition to the order of sale, nor was any appeal taken from it. Defendants in answer to the rule, having alleged their willingness to comply with the order, but suggesting that the sale ought not to be made for cash, the court directed it to be made on the terms.

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suggested by the defendants: Held, that the court had no authority to set aside its first judgment but on a regular opposition. Ibid.

See HUSBAND AND WIFE, 1. MINOR, 9.

JURY.

Where a case in which the defendant prayed for a trial by jury, has been transferred to the docket of cases to be tried by the court, in consequence of the defendant's failure to advance the compensation allowed to the jurors, as required by the statute of 10 February, 1841, s. 17, and has been taken up as a court case, it will be too late, at the moment of trial, to tender the compensation, and to move for a re-transfer of the case to the jury docket.

Daniels v. Andrews, 160.

JURY OF FREEHOLDERS.

See ROADS.

LETTING AND HIRING.

- A lessor may rescind a lease where the building is used for a purpose not contemplated at the time of the contract, and such use is injurious to him.
 Caffin v. Scott, 205.
- 2. Where an action for the rescission of a lease, in which defendant claims damages in reconvention, is tried after the lease has expired, though there can be no judgment of rescission, yet if defendant's demand in reconvention be overruled, and the evidence shows that plaintiff would have been entitled to a judgment of rescission had the trial taken place sooner, there must be judgment in his favor for the costs. 1bid.
- 3. Defendants sold to a third person, who occupied a building leased from plaintiff, certain boxes of merchandize, for the price of which the purchaser gave his note payable thirty days after date. The merchandize was delivered to the purchaser, and placed in his shop in the building leased from plaintiff. Two or three days after the sale, the purchaser absconded; but, on the eve of his departure, wrote to a third person to deliver the merchandize to defendant, and to get back the note given for the price. Defendant took the merchandize from the store of the purchaser and gave up his note, and resold the merchandize. In an action by the landlord against defendant to recover the value of the merchandize thus removed from the premises: Held, that the parties were in a condition to rescind the previous sale, and that defendant was not liable to plaintiff for the value of the merchandize. Walden v. Parrish, 245.
- 4. In an action on a written lease defendant may introduce parol evidence to show that plaintiff had consented, prior to the expiration of the lease, that a third person should occupy the premises as his tenant. Per Curiam: The testimony does not contradict the written lease, but only shows a subsequent agreement in relation to it. Cunningham v. Caldwell, 520.

See CARRIERS.

MARSHAL OF THE CITY COURT OF LAFAYETTE.

No law creates any legal mortgage on the estate of a marshal of the City Court of Lafayette for the faithful discharge of the duties of his office, nor can any such mortgage be created by recording his official bond in the office of the Recorder of Mortgages. 'The tenth sect. of the act of 15 March, 1830, establishing a mortgage on the estates of sheriffs, does not apply to marshals. Cain v. Bouligny, 159.

MINOR.

1. The accounts of the tutor must be settled, before any order can be obtained for the seizure and sale of property in the possession of a third person, subject to the general mortgage in favor of the miner; but a judgment in favor of the latter, rendered on an opposition made by him to a tableau, of distribution presented by the curatrix of the deceased tutor, ordering the minor to be placed thereon as a creditor of the deceased for the amount claimed, and recognizing his mortgage, is a sufficient settlement.

Gilbert v. Burg, 15.

- 2. A natural tutor is entitled to administer the property of his children without giving security, (C. C. 327, 330); but he cannot administer upon a succession opened in their favor, without having been appointed administrator, and giving security as any other individual. C. C. 1037. It is only after such an appointment that he can be considered as the representative of the succession, and be sued as such in the Court of Probates for the debts due by the estate. Self v. Morris, 24.
- 3. As a succession opened in favor of miners can be accepted for them only with benefit of inventory, it cannot be said to be their property, and does not legally come into their possession, until it has been duly administered, when, whatever may remain after the payment of debts, will fall under the administration of their tutor. C. C. 1051. Arts. 327 and 330 of the Civil Code provide only for the administration of the separate and exclusive property of minors, in which no other person is interested. Ibid.
- 4. Where, in an action by a minor against her tutor, plaintiff prays that the latter may be ordered to render an account, and to pay her a certain sum, or whatever amount may be found due by him, and defendant renders no account, the plaintiff may prove any sum received by him. C. P. 998. Per Curiam: The rule that a general allegation of a party being indebted in a gross sum, without any specification of the time, place or manner in which the sum accrued, is too vague to authorize the admission of proof, the object of which is to prevent the defendant from being taken by surprise, is inapplicable to the case of a tutor called upon to account, who knows what is asked of him; his ward is under no obligation to state the time, place and manner of receiving the sums for which he is accountable.

Aubic v Gil, 50.

5. In rendering judgment in an action by a miner against her tutor for a set

tlement of the tutorship, the commissions of the latter should be allowed though not expressly claimed. *Ibid*.

- A minor is entitled to legal interest on the amount ascertained to be due to her by her tutor, from the date of the judgment ascertaining the amount so due. C. C. 353. Ibid.
- 7. A judgment of a Court of Probates homologating the proceedings of a family meeting, and ordering certain real property belonging to minors to be mortgaged, cannot be annulled in a direct action before a District Court. Per Curiam: The action should have been before the Probate Court.

Rhodes v. Union Bank, 63.

8. An attorney in fact appointed by the natural tutrix of minor heirs residing abroad, cannot represent the heirs in the settlement of the succession of their father, opened in this State, where the property left by the deceased was held in community, and the natural tutrix as surviving spouse, has rights which must be exercised contradictorily with the minor heirs. It such a case, an attorney must be appointed to represent the absent heirs. C. C. 1654. Per Curiam: If the natural tutrix were present, having rights to exercise contradictorily with the minor heirs she could not represent them; an under-tutor alone could act for them. C. C. 301.

Succession of De Lizardi, 167.

- 9. A tutor cannot, by proceedings had contradictorily with the under-tutor during the minority of his pupil, make any settlement of his accounts, which will be conclusive upon the latter on attaining the age of majority. Nor does art. 301 of the Civil Code, which makes it the duty of the under-tutor to act for the minor whenever the interest of the latter is opposed to that of the tutor, give the under-tutor any authority to require the tutor to render his accounts. McGehee v. Dupuy, 229.
- 10. Though a minor who has been emancipated by marriage become a widow before the age of twenty-one, she will not return to the state of pupilage.

Wilcox v. Henderson, 338.

- A tutor, not shown to have received any property belonging to his ward, has no account to render. Ibid.
- 12. A Court of Probates has jurisdiction of an action against minors represented by their tutor, for property in the possession of the latter, where both parties claim under a bequest made by a common ancestor and plaintiff sues for a partition. *Penny* v. *Christmas*, 481.

See Successions, 1, 2, 19.

MORTGAGE.

- 1. Execution and Proof of Mortgages.
- II. Legal Mortgages.
- III. Registry of Mortgages.
- IV. Action to Foreclose Mortgage.

V. Sale of Mortgaged Property. VI. Erasure of Mortgages.

I. Execution and Proof of Mortgages.

- In the case of a mortgage or deed of trust, the possession of the property by the mortgagor or debtor, until the sale, is not inconsistent with the deed, and raises no presumption of fraud. Layson v. Rowan, 1.
- 2. Plaintiffs enjoined an order of seizure and sale taken out by a creditor by judicial mortgage against a lot of ground belonging to their debtor, and on which they claimed to have an anterior special mortgage. The lot mortgaged to plaintiffs was erroneously described as being lot 2 in square No. 9, instead of lot 2 in square No. 5; but it was proved that there was no square No. 9, and the description was, in other respects, sufficient to identify the lot; Held, that the error cannot affect plaintiffs' mortgage, it not having misled the defendant, whose right resulted from the recording of a judgment operating on all the property of the debtor.

City Bank v. Denham, 39.

3. The certificate of a Recorder of Mortgages that no mortgage existed on a lot of ground offered for sale by a sheriff, is entitled to no weight, in opposition to authentic evidence showing that a mortgage really existed on the property. Ibid.

II. Legal Mortgages.

- 4. A wife has a general legal mortgage on the lands and slaves of her husband for the reimbursement of her paraphernal funds received and used by the latter; and where her mortgage existed before a seizure and sale of such property under a fi fa: at the suit of a creditor of the husband, she will be entitled to be paid by preference out of the proceeds, unless the seizing creditor prove that the husband has other property sufficient to satisfy her claim. C. P. 401, 403. Willis v. Her Husband, 67.
- 5. No law creates any legal mortgage on the estate of a marshal of the City Court of Lafayette for the faithful discharge of the duties of his office, nor can any such mortgage be created by recording his official bond in the office of the Recorder of Mortgages. The tenth sect. of the act of 15 March, 1830, establishing a mortgage on the estates of sheriffs, does not apply to marshals. Cain v. Bouligny, 159.
- No legal mortgage exists but in the cases provided for by the Civil Code, or by subsequent statutes. C. C. 3280. Ibid.

See 9, 10, infra.

III. Registry of Mortgages.

- 7. The omission to register a mortgage, cannot be taken advantage of by a purchaser of the mortgaged property, who assumed the payment of the debt secured by mortgage as part of the price. Noble v. Cooper, 44.
- No re-inscription of a mortgage is necessary, where the mortgagor has

made a surrender of his property and obtained a stay of proceedings. C. C. 3326. Per Curiam: The rights of the creditors of an insolvent must be acted on with reference to their situation when his bilan was filed, and all proceedings against him stayed. Bethany v. His Creditors, 61.

 The mortgage which the wife has on the property of her husband for her dotal rights, is not required to be recorded. C. C. 3298. It secures the amount of such property, with legal interest from the dissolution of the community. Fortier v. Slidell, 398.

See 5, supra.

IV. Action to Foreclose Mortgage.

10. The accounts of the tutor must be settled, before any order can be obtained for the seizure and sale of property in the possession of a third person, subject to the general mortgage in favor of the minor; but a judgment in favor of the latter, rendered on an opposition made by him to a tableau of distribution presented by the curatrix of the deceased tutor, ordering the minor to be placed thereon as a creditor of the deceased for the amount claimed, and recognizing his mortgage, is a sufficient settlement.

Gilbert v. Burg, 15.

- 11. The maker of a note secured by mortgage when sued by a party subrogated to the rights of the payee, cannot defend himself by alleging that the syndic of the creditors of the payee, by whom the subrogation was made, had no authority to make it. The creditors alone can complain if the syndic acted illegally. The defendant is not called upon to protect their rights.

 Planché v. Roy, 453.
- 12. Under the 24th sect. of the act of the 1 April, 1833, incorporating the Citizens Bank of Louisiana, which provides "that all property mortgaged to the bank for any purpose, may be seized and sold, at any time, according to law, in whosoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession by succession or descent to heirs or legatees by last will and testament, or otherwise, in the same manner as if the same was in possession of the original mortgagor," the bank may obtain from a court of ordinary jurisdiction an order of seizare and sale against property mortgaged to it, though in possession of the executor of the mortgagor, on notifying the latter in order to give him an opportunity by paying the mortgage debt, to avoid being disturbed.

Citizens Bank v. Buisson, 506.

13. Where plaintiff, having prayed for an order of seizure and sale against certain property and notified defendant as executor of the mortgagor, subsequently changes the proceedings to those via ordinaria, and, representing that defendant is in possession of the mortgaged property, prays that he may be cited and for a judgment against him for the amount of the debt, and in case of his failure to pay, ordering the property to be sold, the judgment should direct the mortgaged property to be sold, unless the defendant pay the mortgage debt. The defendant being cited in the proceedings via or-

dinaria, merely as the actual possessor of the mortgaged premises, no judgment can be rendered against him as executor. *Ibid*.

V. Sale of Mortgaged Property.

14. All the privileges and mortgages existing on property sold under execution, where the debtor has no other property to pay his debts, are transferred from the property to its proceeds, the distribution of which must be made as in case of a concurso. C. P. 301, 401, 402, 403. And where a balance of the proceeds of property sold under execution, remaining after satisfying the plaintiff's claim, is seized under a fi. fa. by a third person, the latter can acquire no greater right than if he had seized the property itself.

Fulton v. Her Husband, 73.

- 15. So long as money received under an execution has not been paid to the seizing creditor, it is not too late to set up claims entitled to be paid by preference out of the amount. The money represents the property of which it is the proceeds, and is subject to the privileges and mortgages which existed on it. C. P. 401, 402, 403. Willis v. Her Husband, 87.
- 16. No adjudication can be made of property subject to special mortgages of an older date than that of the mortgagee at whose suit it is offered for sale, unless the price bid exceed the amount of the anterior mortgages. C. P. 684. Hills v. Jacobs, 406.
- 17. Where a bidder for property offered for sale at the suit of a mortgagee refuses to pay the price bid by him, on the ground that a mortgage held by him is entitled to a preference over that of the seizing creditor, and the sheriff in consequence refuses to complete the sale, the bidder cannot afterwards insist upon the sale as valid. Ibid.

VI. Erasure of Mortgages.

- 18. The refusal of a mortgagee to consent to the erasure of a mortgage will not subject him to the payment of damages, though the mortgage had ceased to exist, where there is no proof of any actual injury, nor of any fraud or bad motive on the part of the mortgagee, who merely asserted a legal right which he believed to exist. Williams v. Bank of Louisiana, 316.
- 19. Mortgages acquired by third persons under the faith and protection of a decree of a court of competent jurisdiction, which has never been annulled, ordering the erasure of a previous mortgage, must be respected. Third persons are not bound to look beyond such a decree.

Guesnon v. His Creditors, 382. Dumas v. Guesnon, 518.

20. The Code of Practice does not provide for the erasure of mortgages subsequent or inferior to that of the suing creditor, where any surplus remains after paying his anterior, special mortgage. Art. 707 directs, that if any surplus remain after paying the suing creditor, the purchaser shall apply it to the payment of any subsequent special mortgages existing on the property; but there is no provision for a case in which the subsequent mortgages are not special, but general. In such a case, the purchaser being bound for nothing beyond the price of the adjudication, has a right, on paying that

price, to have the property cleared of all encumbrances subsequent to that of the suing creditor; and as he cannot safely take upon himself to decide to which of the subsequent general mortgages the balance in his hands is to be applied, the institution of an action against the mortgages to compel them to establish their respective rights to the surplus in his hands, and to show cause why, upon depositing such surplus subject to the order of the court, their respective mortgages should not be cancelled, is a safe and proper course for him to pursue. Fortier v. Slidell, 398.

NEW TRIAL.

The decision of a court of the first instance refusing a new trial, will not be reversed unless clearly erroneous. Davis v. Singleton, 56.

NONSUIT.

- 1. A judgment of nonsuit can, in no case, support the plea of res judicats. The fact that the costs of the action in which a judgment of nonsuit was rendered are unpaid, is only ground for a dilatory exception to protect the defendant from a second action before the costs of the first are paid. But where one claiming property seized under a fi. fa. against a third person opposes the sale, and the Judge, without deciding on the merits of the opposition, merely decrees that the costs of it shall be paid by the opponent, the payment of the costs is a condition precedent to his filing a second opposition, but not to an action by him in another court, against the purchaser at the sheriff's sale, for the restitution of the property and for damages for its detention. C. P. 536. Mills v. Webber, 180.
- 2. A plaintiff, who instead of submitting his case to the jury on the evidence received, moves for a nonsuit with leave to set it aside, may appeal from a decision of the court refusing to set aside the nonsuit and grant a new trial. Per Curiam: Such a mode of proceeding is a convenient way of bringing up for the decision of the Supreme Court incidental questions, without going into a trial on the merits of the case.

Clossman v. Barbancey, 438.

NOTARY.

- A notary cannot be examined as a witness to contradict a statement made by him in a protest. Per Curiam: A public officer, who has given a certificate in his official character, cannot be listened to as a witness to prove it false. Peet v. Dougherty, 85.
- 2. A notary is entitled to charge for an inventory executed out of his office, fifty cents for every hundred words; but he is not entitled to any allowance for memoranda made and attested by him for the purpose of preparing the inventory in proper form. For an attested copy of any act, not proved to

have been made out of his office, he can charge but twelve and a half cents for every hundred words. Act of 28 March, 1813, s. 8.

State v. Atchafalaya Railroad and Banking Company, 198.

- 3. By sect. 13 of the act of 14 March, 1842, for the liquidation of banks, it is provided, that it shall be the duty of the notary employed to make an inventory of the property and effects of the bank, and at the time of making such inventory, to destroy, under the inspection of the commissioners and of the board of currency, all the notes of the bank which may be on hand at the time, including such as may not be completed, in the presence of two witnesses and of the officers of the bank, if any be present, of all which mention shall be made in the inventory. Held: that the services required of the notary by this provision, are a part of the labor of making the inventory, and that he is entitled to no additional compensation therefor. Ibid.
- 4. Where notes given for the price of a tract of land are left in deposit with the notary by whom the act of sale was drawn up, the notes or their proceeds to be delivered to the vendor when the property sold shall be released from certain incumbrances, and the notary places them in a bank for collection, and suffers them to remain there after the bank had suspended specie payments until the makers paid them in the depreciated notes of the bank, he will be responsible to the vendor for the full amount of the notes.

Dupeux v. His Creditors, 243.

OFFENCES AND QUASI-OFFENCES.

- 1. Plaintiff purchased from the heirs of an actual settler, a claim to a tract of land which had been recommended by the Register and Receiver for confirmation, and which was subsequently confirmed. In an action against the defendants, who set up no title, for a trespass committed before the title was confirmed: Held, that plaintiff's title was sufficient to maintain an action against a mere trespasser. Watterston v. Jetohe, 20.
- 2. Where one, through ignorance, commits a trespass on another's land, by cutting and removing timber, he will be responsible only for the actual value of the timber used or destroyed. Per Curiam: The case is different, where one wilfully and knowingly commits a trespass on private property. Ibid.
- A sheriff who pays over money in violation of an injunction served upon him, will be responsible to the plaintiff in the injunction for the amount.

Randall v. Parkison, 134.

4. Action for damages for a trespass committed by defendants on lands possessed by plaintiffs as owners, and defence that the lands belong to the United States, and that defendants entered thereon for the purpose of acquiring a pre-emption right thereto: Held, that the title of one possessing as owner cannot be subjected to investigation at the instance of a mere trespasser; and that a party cannot be permitted, under pretext of an intention to purchase from the United States, to assume that land, in the possession of another, is public, and liable to be entered on at pleasure.

Bonis v. James, 149.

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5. Where in an action for damages against the owners of a steamer for injury resulting from a collision between the steamer and plaintiffs' vessel, the evidence leaves it doubtful whether any fault was attributable to the officers of the steamer, plaintiffs cannot recover.

Western Marine and Fire Insurance Company v. Casselly, 154.

- 6. Action for damages against defendant for falsely representing to plaintiff, that he had concluded a contract for him for the delivery of a quantity of shells, at a certain price per barrel. It was proved that no such contract had been made; but defendant answered that he was willing to receive the shells at the price mentioned, and to pay the costs. Per Curiam: The court cannot compel a party to accept a new contract in lieu of one already violated, with a new party and under different circumstances, nor to waive his right to recover damages. Daniels v. Andrews. 160.
- 7. Where in an action for damages for the loss of a slave drowned while engaged in an illegal traffic with defendants, no evidence is introduced to show the value of the slave, no judgment can be rendered in favor of plaintiff.

Villeré v. Græter, 203.

- 8. Before the act of 19th February, 1844, amending art. 2304 of the Civil Code, co-trespassers were liable jointly only, and not in solido. Ibid.
- 9. The refusal of a mortgagee to consent to the erasure of a mortgage will not subject him to the payment of damages, though the mortgage had ceased to exist, where there is no proof of any actual injury, nor of any fraud or bad motive on the part of the mortgagee, who merely asserted a legal right which he believed to exist. Williams v. Bank of Louisiana, 316.
- 10. In an action to recover from defendants damages for their failure to deliver to plaintiff certain notes, which they had improperly delivered to a third person, the value of the notes at the time they should have been delivered to plaintiff is the measure of the damages to which he is entitled, no fraud being alleged or proved; without prejudice, however, to his right of action against such third person for the delivery of the notes.

Gillett v. Landis, 332.

11. An attorney at law is responsible for any injury resulting from his neglect of business intrusted to him. Thus where an attorney employed by the administrator to prepare and file a tableau of distribution of the effects of a succession neglects to avail himself of the means of obtaining correct information, but prepares, and without submitting it to the administrator, files a tableau by which the balance in the hands of the latter is represented as much larger than it really is, and, after the errors are pointed out to him by the administrator neglects to have it corrected, and the tableau is finally homogated, he will be responsible for the injury which the administrator may sustain in consequence of such neglect. Nor will it be any defence to an action against him to allege, that if the administrator were charged with interest on the sums which had remained in his hands, the balance represented by the tableau would not exceed the amount really due to the succession, he having no right to benefit by a debt, which, if it exist, is owing to the creditors or heirs of the estate. Thompson v. Lobdell, 369.

12. Where, through the negligence of an attorney in preparing a tableau of distribution of the effects of a succession, the administrator is made liable, by its homologation, for an amount larger than was really due by him, and proceedings are subsequently commenced for correcting the error, after the termination of which the amount so represented to be due is collected, under execution, from the administrator, prescription will run in favor of the attorney only from the date of the actual payment by the administrator.

Thid.

13. Where an injunction has been obtained to prevent defendant from obstructing the petitioner in the free use of a common passage way, on proof that the obstruction which existed at the time the injunction was sued out has not been removed, the court may order it to be removed at once by the Sheriff, without waiting for a trial on the merits.

McDonogh v. Calloway, 442.

14. As a general principle, corporations are responsible for the acts of their agents; but they are not liable for every act of the persons in their employment. Where an agent acting in the capacity bestowed on him by a corporation, under the directions of his employers, or in the discharge of some duty incidental to his situation, does any act which causes damage to another, the corporation will be responsible; aliter, where an act is done by him of his own free will, without reference to his functions as an agent. Thus a bank cannot be made liable in damages for an unauthorized declaration made by one of its officers, that plaintiff had frequently overdrawn his account. C. C. 430, 431, 433, 434. Etting v. Commercial Bank, 459.

PARAPHERNAL PROPERTY.

See Husband and Wife, 3, 4.

PARTIES.

See Evidence, XII. Pleading, I.

PARTNERSHIP.

- 1. Compensation does not take place, by operation of law, between a debt due by a commercial partnership and one due to one of its members individually; and where the debt due by the partnership has been transferred to a third person and notice given to the debtors, the latter cannot plead the amount of the debt due to the individual partner in compensation, even by way of exception. Dick v. Byrne, 465.
- In an action against a partnership for a debt, defendants may compensate
 by way of exception, a debt due by plaintiff to a member of the partnership
 individually. Ibid.
- Partnership in commendam is not considered by the Civil Code as a distinct species of partnership, but rather as an incident or accessory which may be attached to and incorporated with all kinds of partnerships. The partner

- in commendam is viewed as a partner only to a certain extent. C. C. 2799, 2810, 2811, 2815. Marshall v. Lambelk, 471.
- 4. The liability of a partner in commendam closes with the expiration of the partnership, when he may withdraw the funds contributed by him and his share of the profits, subject only to the debts created during its existence. C. C. 2812, 2847. And where the partnership was formed for a limited period, and the contract recorded in the office of the Recorder of Mortgages, no other notice of the dissolution is necessary. Ibid.
- 5. On the dissolution of a partnership in commendam, the acting partners have a right, in the liquidation of the partnership, to continue to use the social name. The partner in commendam cannot prevent their doing so; nor can the knowledge of the latter that the acting partners continued to use it, subject him to any liability. The presumption upon which liability may be fastened on an ordinary retiring partner who suffers his name to remain as part of the firm, that the partnership was trusted upon his responsibility, does not apply to a partner in commendam, whose name cannot appear in that of the partnership, and whose liability, as to amount and duration, is determined by, and may be ascertained from the registry of the contract which the law requires to be made. So long as he does none of those acts which by law impose on him the liabilities of a common partner, no one has a right to look beyond such registry. C. C. 2819, 2820. Ibid.

PAYMENT.

1. Plaintiff, the holder of a note, having received from the maker a draft on a parish treasurer, payable on a certain day, but accepted "payable when in funds," wrote a receipt on the back of the note, stating "that the draft when paid will be in full for its amount on the note." The draft had been accepted "payable when in funds," before its delivery to plaintiff, and both parties were aware that the parish treasury was insolvent, and that the time of payment would be uncertain. The draft was not protested at maturity, but was subsequently paid. There was no proof that the treasury was in funds before the note was paid: Held, that plaintiff was not bound to pretest the draft, as there was no proof that the condition ever happened under which the acceptance was made; and that credit for the amount of the draft should be allowed only from the date of its actual payment.

Harrell v. Marston, 34.

- Satisfaction of a judgment may be proved by presumptions, as well as by
 positive evidence. The sufficiency of the proof must depend on the circumstances of each case. Bethany v. His Creditors, 61.
- 3. The statute of the State of Alabama of the 10th of January, 1835, which provides (s. 3) "that when any execution shall have been issued on any judgment or decree, &c., within a year and a day from the rendition of any such judgment or decree, which shall not have been returned satisfied in full, such judgment or decree shall not afterwards be presumed to be paid or satisfied, without payment or satisfaction be entered on the records of the court, &c., unless no execution shall be issued on such judgment or decree

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for the space of ten years," establishes a legal presumption of payment in favor of the debtor, when the creditor, after suing out, within a year and a day from the date of the judgment, an execution which is not returned satisfied in full, remains for ten years without taking out another execution. It does not absolutely bar the right of action on such judgment, but throws on the creditor who seeks to recover on it, the burden of proving that it has not been satisfied. Succession of Tilghman, 387.

- 4. A judgment rendered in another State, properly authenticated, must have the same force and effect here as in the State in which it was rendered; but it can have no greater effect. Thus, where by the laws of the State in which a judgment was rendered, it will be presumed to have been paid in case no execution be issued thereon within a certain time, such presumption will attach to the judgment, and exist in favor of the debtor in an action on the judgment in this State. Ibid.
- 5. Where a statute declares that a judgment shall be presumed to have been paid, in case no execution be sued out within a certain period after it was rendered, the period must be calculated from the date of the judgment, though anterior to the passage of the act, and though sufficient time have not elapsed since its enactment to establish the presumption if calculated from that time. Ibid.
- 6. Action by a physician for services rendered, and medicines furnished to the deceased. The evidence showed, that the disease for which the latter was treated was incurable, but that a wound received during his illness was the immediate cause of his death: Held, that the physician was not entitled to a privilege for the amount of his bill; that such a privilege is allowed only for medicines furnished, and services rendered during the last sickness, (C. C. 3158); and that by the last sickness is meant that of which the patient died. C. C. 3166. Succession of Whitaker, 91.

PLEADING.

- I. Parties to Action.
- II. Actions where to be brought.
- III. Petition and Amendments thereto.
- IV. Exceptions, Answer and Oppositions.
 - V. Demands in Reconvention.
- VI. Intervention.

I. Parties to Action.

- In every action on a joint contract all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. C. C. 2080. Bird v. Doiron, 181.
- The heir acquires the succession of the person from whom he inherits immediately after the death of the latter. This right is vested in him by operation of law alone, before he has taken any step to put himself in possession.

One of its effects is to authorize him to institute any action which the deceased had a right to institute, and to prosecute those already commenced. C. C. 934, 935, 936, 939. He cannot be required, in order to authorize him to sue, to show that he has been recognized as heir, and put in possession of the estate by a decree of the Court of Probates of the place where the succession was opened. All that can be required of him is to furnish satisfactory evidence of his right to inherit. The recognition of the heir by the Probate Court is only required where he seeks to compel a curator, executor or administrator to render an account. C. P. 1000, 1001, 1002, 1003.

Le Page v. Gas Light and Banking Company, 183.

- 3. In an action instituted by one held as a slave to establish his right to freedom, the only issue which can be presented is liber vel non. Plaintiff cannot contest the title of the defendant but by establishing his own right to freedom. A slave is incapable of appearing in court for any other purpose than that of claiming his freedom. Lewis v. Cartwright. 186.
- 4. Where plaintiff, having prayed for an order of seizure and sale against certain property and notified defendant as executor of the mortgagor, subsequently changes the proceedings to those via ordinaria, and, representing that defendant is in possession of the mortgaged property, prays that he may be cited and for a judgment against him for the amount of the debt, and in case of his failure to pay, ordering the property to be sold, the judgment should direct the mortgaged property to be sold, unless the defendant pay the mortgage debt. The defendant being cited in the proceedings via ordinaria, merely as the actual possessor of the mortgaged premises, no judgment can be rendered against him as executor.

Citizens Bank v. Buisson, 506.

Corporators may maintain an action against each other relative to the affairs
of the corporation, during its existence. Percy v. White, 513.

II. Actions where to be brought.

6. When the heirs of a succession, being of age, have accepted it unconditionally, or, being minors, have come into possession of it as beneficiary heirs after the administration has legally terminated, they must be sued in courts of ordinary jurisdiction for any debts due by the succession. C. P. 996.

Self v. Morris, 24.

7. Whenever a succession is accepted with benefit of inventory, and minors cannot accept in any other way, it must be administered as a vacant estate, under the authority of the Probate Court; and all claims against it must be sued for in that court, against the administrator appointed to settle it.

Thid.

8. A judgment of a Court of Probates homologating the proceedings of a family meeting, and ordering certain real property belonging to minors to be mortgaged, cannot be annulled in a direct action before a District Court. Per Curiam: The action should have been before the Probate Court.

Rhodes v. Union Bank, 63.

9. All actions pending, and all claims against one who has made a forced sur-

render under the statute of 25 March, 1808, for the relief of insolvent debtors in actual custody, must be removed to, and cumulated in the tribunal before which the insolvent proceedings are pending.

Jacobs v. Bogart, 162.

10. A Police Jury is a corporation established for the whole parish, and cannot be sued in any court the territorial jurisdiction of which is limited to a part of the parish, though the Parish Judge, who is ex officio president of the jury, and the clerk reside within the limits of its jurisdiction, and though the jury itself meet and keep its records at a place within the jurisdiction of the court. It has no domicil but the parish, and must be sued in a court having jurisdiction over the whole parish. Nor does it make any difference that the work for which the plaintiff seeks remuneration, was done within the territorial jurisdiction of the court.

Berthaud v. Police Jury of Jefferson, 550.

III. Petition and Amendments thereto.

11. Where, in an action by a minor against her tutor, plaintiff prays that the latter may be ordered to render an account, and to pay her a certain sum, or whatever amount may be found due by him, and defendant renders no account, the plaintiff may prove any sum received by him. C. P. 998. Per Curiam: The rule that a general allegation of a party being indebted in a gross sum, without any specification of the time, place or manner in which the sum accrued, is too vague to authorize the admission of proof, the object of which is to prevent the defendant from being taken by surprise, is inapplicable to the case of a tutor called upon to account, who knows what is asked of him; his ward is under no obligation to state the time, place and manner of receiving the sums for which he is accountable.

Aubic v. Gil, 50.

12. After a motion to dissolve an injunction, plaintiff cannot, by filing an amended petition containing new allegations, cure a radical defect in his original proceedings, and thereby give effect to an injunction originally illegal.

Rhodes v. Union Bank, 63.

- 13. In an action against the curator to recover an amount due by the deceased, plaintiff alleged that the latter had been very careful in keeping his accounts, and that evidence of her demand would be found on his books, or among his papers: Held, that this allegation does not show that the demand was founded on a written contract, nor compel the petitioner to admit the books and papers of the deceased in evidence. Succession of Segond, 111.
- 14. On a prayer for the removal of an administratrix the grounds of the application must be stated that she may have notice thereof.

Succession of Kendrick, 138.

15. A petition may be amended with the leave of court after issue joined, provided such amendment do not alter the substance of the demand. C. P. 419. Leave to amend is in the discretion of the court.

Succession of Rouzan, 436.

16. Where petitioners pray that a will may be set aside, but in case it be sus-

tained, that certain legacies may be delivered to them, on their performance of the conditions imposed by the testator, which they hereby offer to perform, they cannot amend by striking out, or discontinuing their offer to accept the legacies under the conditions imposed by the will. *Ibid*.

IV. Exceptions, Answer and Oppositions.

17. Where opposition is made to the account presented by an administratrix, the items objected to must be specified, and the grounds of objection briefly and clearly stated, that she may have full notice thereof.

Succession of Kendrick, 138,

- 18. Where a creditor who has been placed on the schedule of an insolvent, and made a party to the proceedings for a forced surrender under the act of 1808, does not prove his debt, nor make any opposition in the lower court to the discharge of the insolvent from his debts, it will be too late to oppose his discharge on an appeal. Jacobs v. Bogart, 162.
- 19. Compensation does not take place, by operation of law, between a debt due by a commercial partnership and one due to one of its members individually; and where the debt due by the partnership has been transferred to a third person and notice given to the debtors, the latter cannot plead the amount of the debt due to the individual partner in compensation, even by way of exception. Dick v. Byrne, 465.
- 20. In an action against a partnership for a debt, defendants may compensate by way of exception, a debt due by plaintiff to a member of the partnership individually. Ibid.
- 21. After a dilatory exception had been overruled, defendant filed a paper in these words: "To the judge, &c.; the answer of, &c. says that the action of plaintiff is prescribed, and respondent prays that the petition be dismissed, with costs." Held, that this must be considered as an answer to the merits; that though prescription may be set up as an exception, it may also be pleaded as an answer, and that the answer not denying the allegations of the petition, they were properly considered as admitted, and judgment correctly rendered for the plaintiff, without further evidence.

Macarty v. Bureau, 467.

22. Pleas of the general issue and prescription are not inconsistent. Ibid.

V. Demands in Reconvention.

23. Where one of two persons designated by a testator to act as his executor in a certain event, presents a petition to the Probate Court to be confirmed as executor, and makes the other a party to the proceeding, and the latter contests his right, and, by a reconventional demand, asserts a better right to the appointment, the former cannot, by withdrawing his petition, defeat the demand of the latter. Succession of Gourjon, 422.

VI. Intervention.

24. Where an intervening party prays for a dissolution of an injunction obtain-

ed by plaintiff, and for interest and damages, the plaintiff cannot, by dismissing his suit, deprive the former of his right to a judgment.

Whittemore v. Watts, 10.

POLICE JURY.

1. A police jury has no authority to establish a new road through the lands of an individual without compensating him therefor, unless it be shown that he will derive therefrom something like a commensurate benefit, nor to compel him to make such a road at his own expense. Per Curiam: The acts of the Legislature conferring the powers possessed by police juries in relation to public roads (acts of 25 March, 1813, § 5: 22 February, 1817, § 3: 30 January, 1834, §§ 4, 5, &c.) cannot be understood as repealing the articles of the Civil Code relative to the mode of expropriating property, where no other mode of expropriation is pointed out by them. Art. 489, which declares that private property shall not be taken for public use without indemnity, as well as arts. 2604 to 2611, which confirm the same principle and point out the mode of expropriating property when the legislature has not directed otherwise, has a constitutional sanction, and cannot be violated by parochial legislation, nor by that of the State itself.

Police Jury of Jefferson v. D'Hemecourt, 509.

2. A police jury is a corporation established for the whole parish, and cannot be sued in any court the territorial jurisdiction of which is limited to a part of the parish, though the Parish Judge, who is ex officio president of the jury, and the clerk reside within the limits of its jurisdiction, and though the jury itself meet and keep its records at a place within the jurisdiction of the court. It has no domicil but the parish, and must be sued in a court having jurisdiction over the whole parish. Nor does it make any difference that the work for which the plaintiff seeks remuneration, was done within the territorial jurisdiction of the court.

Berthaud v. Police Jury of Jefferson, 550. See ROADS.

POSSESSION.

1. Action for damages for a trespass committed by defendants on lands possessed by plaintiffs as owners, and defence that the lands belong to the United States, and that defendants entered thereon for the purpose of acquiring a pre-emption right thereto: Held, that the title of one possessing as owner cannot be subjected to investigation at the instance of a mere trespasser; and that a party cannot be permitted, under pretext of an intention to purchase from the United States, to assume that land, in the possession of another, is public, and liable to be entered on at pleasure.

Bonis v. James, 149.

Where in an action to recover certain slaves it is proved that defendant got
possession of them illegally and fraudulently, and was the last person seen
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in possession of them, they will be presumed to be still in his possession. The burden of proving that he has parted with the possession is on him. Drummond v. Commissioners of Clinton and Port Hudson Railroad Company, 234.

PRESCRIPTION.

1. Action to annul a judgment on the ground of fraud on the part of the plaintiff in claiming more than he was entitled to recover. There was no proof at what time the alleged fraud was discovered: *Held*, that in the absence of evidence that the fraud was discovered since the date of the original judgment, prescription must be considered to have commenced from the date of the judgment; and that the action is prescribed by one year from that time.

Farrar v. Peyroux, 92.

- An action to annul a judgment on the ground of fraud must be brought within a year after the discovery of the fraud, (C. P. 613); and where the defendant expressly denies any discovery of fraud within that time, the plaintiff must prove it. Wheat v. Union Bank, 94.
- 3. Where, through the negligence of an attorney in preparing a tableau of distribution of the effects of a succession, the administrator is made liable, by its homologation, for an amount larger than was really due by him, and proceedings are subsequently commenced for correcting the error, after the termination of which the amount so represented to be due is collected, under execution, from the administrator, prescription will run in favor of the attorney only from the date of the actual payment by the administrator.

Thompson v. Lobdell, 369.

- 4. An action on a judgment obtained in another State is prescribed only by the lapse of twenty years, where the judgment creditor resides out of this State. C. C. 3508. Succession of Tilghman, 387.
- 5. After a dilatory exception had been overruled, defendant filed a paper in these words: "to the judge, &c.; the answer of, &c. says that the action of plaintiff is prescribed, and respondent prays that the petition be dismissed, with costs." Held, that this must be considered as an answer to the merits; that though prescription may be set up as an exception, it may also be pleaded as an answer, and that the answer not denying the allegations of the petition, they were properly considered as admitted, and judgment correctly rendered for the plaintiff without further evidence.

Macarty v. Bureau, 467.

- 6. Pleas of the general issue and prescription are not inconsistent. Ibid.
- 7. An action by the stakeholders against the directors of a bank for damages for losses sustained through their negligence, fraud or mismanagement, is prescribed by ten years from the date of the acts complained of.

Percy v. White, 513.

PRESUMPTION.
See Evidence, II.

PRIVILEGE.

1. All the privileges and mortgages existing on property sold under execution, where the debtor has no other property to pay his debts, are transferred from the property to its proceeds, the distribution of which must be made as in case of a concurso. C. P. 301, 401, 402, 403. And where a balance of the proceeds of property sold under execution, remaining after satisfying the plaintiff's claim, is seized under a fi. fa. by a third person, the latter can acquire no greater right than if he had seized the property itself.

Fulton v. Her Husband, 73.

- 2. So long as money received under an execution has not been paid to the seizing creditor, it is not too late to set up claims entitled to be paid by preference out of the amount. The money represents the property of which it is the proceeds, and is subject to the privileges and mortgages which existed on it. C. P. 401, 402, 403. Willis v. Her Husband, 87.
- 3. Action by a physician for services rendered, and medicines furnished to the deceased. The evidence showed, that the disease for which the latter was treated was incurable, but that a wound received during his illness, was the immediate cause of his death: Held, that the physician was not entitled to a privilege for the amount of his bill; that such a privilege is allowed only for medicines furnished, and services rendered during the last sickness, (C. C. 3158); and that by the last sickness is meant that of which the patient-died. C. C. 3166. Succession of Whitaker, 91.

PROHIBITION.

Where the facts upon which an application for a prohibition to arrest the proceedings in an action is based, appear from the record of the case itself, they need not be supported by the oath of the applicant.

Berthaud v. Police Jury of Jefferson, 550.

QUASI-CONTRACTS.

1. Money paid by the endorser of a bill who had been discharged by the lackes of the holder, in ignorance of his discharge, may be recevered back. C. C. 2280. There is, on his part, no such natural obligation to pay, as can prevent his recevering the amount. C. C. 2281. Per Curiam: His undertaking was, to pay, provided the holder made due demand of the acceptor, and gave him due notice of non-acceptance or non-payment. His obligation was conditional; and when the condition failed, he was under no obligation, either natural or civil to pay.

Heath v. Commercial Bank, 334.

- To reclaim money paid on the ground that it was not due, plaintiff must ahow not only that it was not due, but that it was paid through error, and that he was under no natural obligation to make such payment. C. C. 1752, 2279, 2280, 2281. C. P. 18. Hills v. Kernion, 522.
- 3. Plaintiffs, factors for the sale of tobacco, having paid defendants, tobacco-

inspectors appointed by the State, a certain sum beyond the fees allowed by law, for every hogshead of tobacco inspected by them, reclaimed the amount alleging that it had been illegally extorted by defendants, who had refused to do their duty unless it was paid. It was proved that defendants had given public notice, of their willingness, as individuals, to render certain services not prescribed by law, when requested by the parties interested, on receiving an additional compensation for each hogshead; that plaintiffs knew, when they consented to pay such extra-charge, that it exceeded the amount allowed by law, and was for service which defendants were not required to render as inspectors; that this extra-charge was but a fair remunegation for the additional services, which were beneficial to all interested in the tobacco; and that plaintiffs had always charged this extra compensation to the owners of the tobacco by whom the amount had been paid. There was no proof that the inspectors had ever refused to do their duty unless the extra-charge was paid. Held, that equity forbidding that plaintiffs should profit by the labor of the defendants without a fair remuneration, and the consideration for which the extra-compensation was paid not being immoral nor unjust, there was a natural obligation on the part of the plaintiffs to pay, and that no action will lie to recover back the amount. C. C. 1750, 1751, 1752, 2279, 2280, 2281. C. P. 18. Ibid.

RECONVENTION.

See Pleading, V.

REGISTRY.

- The omission to register a mortgage, cannot be taken advantage of by a
 purchaser of the mortgaged property, who assumed the payment of the debt
 secured by mortgage as part of the price. Noble v. Cooper, 44.
- No re-inscription of a mortgage is necessary, where the mortgagor has
 made a surrender of his property and obtained a stay of proceedings. C. C.
 3326. Per Curiam: The rights of the creditors of an insolvent must be
 acted on with reference to their situation when his bilan was filed, and all
 proceedings against him stayed. Bethany v. His Creditors, 61.
- The mortgage which the wife has on the property of her husband for her dotal rights, is not required to be recorded. C. C. 3298. It secures the amount of such property, with legal interest from the dissolution of the community. Fortier v. Slidell, 398.

RESCISSION.

See SALE, IV.

ROADS.

1. Proceedings of police juries and juries of freeholders, under the act of 12

March, 1818, relative to public roads, involving questions of police rather than of a judicial character, should be sustained unless manifestly unjust.

Cross v. Police Jury of Lafourche Interior, 121.

- 2. The second section of the act of 12 March, 1818, which gives the right to any individual dissatisfied with the decision of a jury of freeholders laying out a road through his land, either as to the course of the road, or the damages allowed to him, to appeal to the District Court, does not authorize the appellant, on his single opposition, and without making any other party than the Police Jury, to contest the opening of such road beyond the limits of his own property. Evidence to show that a better route might have been selected beyond his limits, is irrelevant and inadmissible in a proceeding to which the proprietors of the lands, over which the road is to pass are not parties. *Ibid*.
- 3. Where on an appeal from the decision of a jury of freeholders establishing a road under the act of 12 March, 1818, the jury to whom the case is submitted in the District Court, are of opinion, that another route through the lands of the appellant, indicated by him, is practicable and reasonably convenient to the public, and less injurious to the appellant, they may substitute such route for that selected by the jury of freeholders, and order the road to be made along it. Per Curiam: As a general rule the most direct and best route should be selected; but this rule is subject to exceptions, one of which is, that too much injury should not be inflicted on individuals. Where a direct course would cause great damage, the road should approximate to it as mear as it can under all the circumstances. Ibid.
- 4. On an appeal from the decision of a jury of freeholders establishing a road through the lands of the appellant, defendants offered in evidence a petition addressed to them by the former, at a previous period, with parol evidence to show the action on it, and the selection by the appellant, of the route to which defendants consented in their answer; *Held*, that the evidence was admissible; and that if there had been any change in the property, or in circumstances, calculated to alter his opinion, it was competent for him to show it, and thereby destroy the effect of the evidence. *Ibid*.
- 5. On appeal from the decision of a jury of freeholders establishing a road, under the act of 12 March, 1818, the appellant may introduce evidence to prove that a convenient and good road may be laid out through his lands, less injurious than the one proposed by the jury, though such route was not specially indicated in his opposition. So, evidence will be admissible on his part to show, that the construction of the road along another route would cost less than the one designated by the defendants, the law giving to the court and jury to whom the appeal is submitted, a power of revision over the damages as well as the course of the road. Ibid.

SALE.

- L. Requisites and Proof of Sale.
- II. Warranty and Eviction.

III. Rights and Obligations of Vendee.

IV. Rescission.

V. Judicial Sales.

I. Requisites and Proof of Sale.

- Where an authentic act of sale contains an absolute assumption by the purchaser of a debt due by the vendor to a third person, a paper, signed by the vendor, declaring that the assumption was not an absolute one, will be inadmissible against such third person to disprove the absolute character of the assumption, unless the fact be sworn to. McMichael v. Davidson, 53.
- 2. Plaintiff having sold a tract of land before her marriage, received certain notes for the price. The notes matured after her marriage, when, the purchaser being unable to pay, agreed to rescind the sale, and on receiving his notes, reconveyed the property to the plaintiff. She subsequently resold the property to a third person, her husband assisting in the sale, and receiving the price. Held, that the re-transfer made to the plaintiff by the first purchaser, cannot be viewed as a purchase made during the marriage; that the land became the property of the petitioner, in the same manner as if the first sale had been judicially rescinded; that she held it by the title she had before her marriage, as though no sale had been made; and that, consequently, it never belonged to the community. Fulton v. Her Husband, 73.
- 3. Where a deed of trust requires that public notice shall be given for a certain number of days of any sale made under it, the particular day on which the sale is to take place, must be notified to the public for the time required. If after such notice, the sale be postponed, new notice must be given, for the full time required, of the day to which it is postponed.

Tupper v. Scott, 323.

See 20, infra.

II. Warranty and Eviction.

- 4. A purchaser of real estate, sued for the price, can only require security against the danger of eviction, where he has reasonable ground for apprehending it. Hearsey v. Riddle, 22.
- 5. A purchaser at a judicial sale of property on which there exists a general mortgage, judicial or legal, against whom an action has been commenced, or who has good reason to fear that an action will be commenced against him by the mortgagee, may withhold the price until relieved from such apprehension, or until proper security be given against the danger of eviction. C. P. 710. Fortier v. Slidell, 398.
- 6. The vendor of a slave, cited in warranty by his vendee, against whom a judgment is recovered by a third person for the slave and the value of her services from judicial demand, will be responsible to his vendee for the price of the slave with legal interest from the time of such demand, but not for the value of her services from that time, as ascertained by the judgment against his vendee. Burkett v. Layton, 457.

III. Rights and Obligations of Vendee.

- 7. The omission to register a mortgage, cannot be taken advantage of by a purchaser of the mortgaged property, who assumed the payment of the debt secured by mortgage as part of the price. Noble v. Cooper, 44.
- 8. Plaintiff sold defendants a tract of land, for the price of which notes were taken bearing interest, at a certain rate, from date until paid. The land was subject to a mortgage in favor of a third person, and it was stipulated in the act of sale, that the notes should remain with a depositary until the vendor should cause the mortgage to be released, and that the notes should not be payable until such release. It was admitted that the land was capable of producing revenue by heing rented. There was no attempt by the purchasers to relieve themselves from interest by depositing the price. Held, that the purchasers knowing that the notes were not to be paid until the release of the mortgage, and having consented that interest should run from the date of the contract until payment, the interest must be paid as part of the consideration of the sale. Erwin v. Greene, 175.
- 9. Where real estate, capable of producing revenue, is sold for a price payable at a fixed period, and the note of the purchaser is taken for the price, without any stipulation as to interest, but subject to the condition that the note shall remain on deposit, and the payment not be demandable until the vendor shall release a mortgage existing on the property, and the purchaser has possession and enjoyment of the thing sold, legal interest will be due on the price of the property from the time when the principal was payable. C. C. 1933, 2531. Though entitled to suspend the payment of the price until the mortgage be released, the purchaser could only avoid the payment of interest by depositing the price. C. C. 2537. Ibid.
- 10. The rights of an assignee of a deed of trust executed in another State, must be determined by the conditions of the assignment. In proceeding under the deed of trust he must conform to the conditions on which it was assigned to him. Tupper v. Scott, 323.
- 11. Where it is stipulated in a notorial act of sale that the purchaser may postpone the payment of a note given by him for the price for a certain time after maturity; on paying interest annually in advance, and the obligor states on the face of the note, which was executed at the same time as the act of sale, that he reserves to himself the right to postpone the payment for the stipulated time, the note and the act must be construed together, and be considered as proving a contract that the principal shall not be exigible until the time to which it was agreed that payment might be postponed, on the payment of interest annually; and the failure of the maker to pay the interest due for any year, will not operate as a forfeiture of the right to delay the payment of the principal, no such penalty being expressed, or implied. The holder of the note has only a right of action, at the commencement of each year, for the interest due. Bacchus v. Moreau, 539.

See 16, 18, infra.

IV. Rescission.

- 12. Action to recover the amount paid to defendants for a treasury note, endorsed by them to plaintiff "without recourse." It was proved that plaintiff paid a premium for the note, and that, after the sale, it was discovered that the note had been redeemed at the Custom House and cancelled, but that it had been afterwards purloined, the word "cancelled" which had been written on it, extracted, and the note put into circulation. Held, that the sale must be rescinded on account of the error of the purchaser as to the substance of the thing. Knight v. Lanfear, 172.
- 13. A judgment creditor cannot treat a conveyance made by his debtor as null and seize the property so conveyed, in the possession of a third person. If the conveyance be illegal or void, he must sue such third person to annul it. Drummond v. Commissioners of Clinton and Port Hudson Railroad Company, 234.
- 14. Defendants sold to a third person, who occupied a building leased from plaintiff, certain boxes of merchandize, for the price of which the purchaser gave his note payable thirty days after date. The merchandize was delivered to the purchaser, and placed in his shop in the building leased from plaintiff. Two or three days after the sale, the purchaser absconded; but, on the eve of his departure, wrote to a third person to deliver the merchandize to defendant, and to get back the note given for the price. Defendant took the merchandize from the store of the purchaser and gave up his note, and resold the merchandize. In an action by the landlord against defendant to recover the value of the merchandize thus removed from the premises: Held, that the parties were in a condition to rescind the previous sale, and that defendant was not liable to plaintiff for the value of the merchandize. Walden v. Parrish, 245.
- 15. The fact that the thing sold remains in the possession of the vendor is a badge of fraud, and throws upon the vendee the burden of proving the reality of the sale; and this even where the vendor has reserved to himself the usufruct, or retains the possession by a precarious title. C. C. 2456.

Merritt v. Burgess, 434.

V. Judicial Sales.

- 16. The statement by a sheriff in an act of sale, that the property is sold subject to a general mortgage made in compliance with the provision of the Code of Practice, art. 693, § 6, can impose no obligation on the purchaser to which he is not subjected by law. Per Curiam: A sheriff has no authority of his own to impose any burden on a purchaser beyond the provisions of the law. Purchasers at sales under execution, are not personally bound for anterior general mortgages existing on the property purchased by them. They are only liable to an hypothecary action. C. P. 679, 683, 693, 710.

 Fortier v. Slidell, 398.
- 17. Where a purchaser at a judicial sale refuses to pay the amount of a special mortgage, which formed a part of the price and had been left in his hands at the time of the sale, on the ground of the danger of eviction, and the pro-

perty is resold at the suit of the special mortgagee, the first sale becomes null and void. *Ibid*.

- 18. The Code of Practice does not provide for the erasure of mortgages subsequent or inferior to that of the suing creditor, where any surplus remains after paying his anterior, special mortgage. Art. 707 directs, that if any surplus remain after paying the suing creditor, the purchaser shall apply it to the payment of any subsequent special mortgages existing on the property; but there is no provision for a case in which the subsequent mortgages are not special, but general. In such a case, the purchaser being bound for nothing beyond the price of the adjudication, has a right, on paying that price, to have the property cleared of all encumbrances subsequent to that of the suing creditor; and as he cannot safely take upon himself to decide to which of the subsequent general mortgages the balance in his hands is to be applied, the institution of an action against the mortgagees to compel them to establish their respective rights to the surplus in his hands, and to show cause why, upon depositing such surplus subject to the order of the court, their respective mortgages should not be cancelled, is a safe and proper course for him to pursue. Ibid.
- 19. No adjudication can be made of property subject to special mortgages of an older date than that of the mortgagee at whose suit it is offered for sale, unless the price bid exceed the amount of the anterior mortgages. C. P. 684. Hills v. Jacobs, 406.
- 20. Where a bidder for property offered for sale at the suit of a mortgage refuses to pay the price bid by him, on the ground that a mortgage held by him is entitled to a preference over that of the seizing creditor, and the sheriff in consequence refuses to complete the sale, the bidder cannot afterwards insist upon the sale as valid. Ibid.
- 21. A police jury has no authority to establish a new road through the lands of an individual without compensating him therefor, unless it be shown that he will derive therefrom something like a commensurate benefit, nor to compel him to make such a road at his own expense. Per Curiam: The acts of the Legislature conferring the powers possessed by police juries in relation to public roads (acts of 25 March, 1813, § 5; 22 February, 1817, § 3; 30 January, 1834, §§ 4, 5, &c.) cannot be understood as repealing the articles of the Civil Code relative to the mode of expropriating property, where no other mode of expropriation is pointed out by them. Art. 489, which declares that private property shall not be taken for public use without indemnity, as well as arts. 2604 to 2611, which confirm the same principle and point out the mode of expropriating property when the legislature has not directed otherwise, has a constitutional sanction, and cannot be violated by parochial legislation, nor by that of the State itself.

Police Jury of Jefferson v. D'Hemecourt, 509.
See 5, supra.

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SEQUESTRATION.

The surety in a sequestration bond cannot be made responsible for any injury to the property sequestered, prior to the date of the bond.

Mc Michael ▼. Gillispi , 13.

2. A sheriff while he retains possession of sequestered property, is bound to take proper care of it, and to administer it as a prudent father of a family would administer his own affairs; and he is entitled to a just compensation therefor, to be determined by the court. C. P. 283. C. C. 2949, 2950. Where slaves are sequestered he is authorized to make the distursements necessary for their preservation, and to put them in a place of safety, (C. P. 659, 661); but he cannot hire them out unless expressly authorized by the court, with the consent of both parties. C. P. 662.

Parkison v. Boyle, 82.

SHERIFF.

One who intends to commence an action against the sheriff of a parish in
which there is no coroner, must provoke the appointment of one, the coroner alone having authority to serve process on the sheriff.

Jacobs v. Ducros, 115.

- 2. A sheriff who pays over money is violation of an injunction served upon him, will be responsible to the plaintiff in the injunction for the amount.
 - Randall v. Parkison, 134.
- 3. Bonds received by a sheriff in his official capacity should, on his ceasing to act as such, be delivered to his successor. Simpson v. Allain, 500.

See SEQUESTRATION, 2.

SHIPPING.

See CARRIERS. EVIDENCE, 23.

SLAVE.

In an action instituted by one held as a slave to establish his right to freedom, the only issue which can be presented is liber vel non. Plaintiff cannot contest the title of the defendant but by establishing his own right to freedom.

A slave is incapable of appearing in court for any other purpose than that of claiming his freedom. Lewis v. Cartwright, 186.

STATEMENT OF FACTS.

See APPEAL, 12, 13.

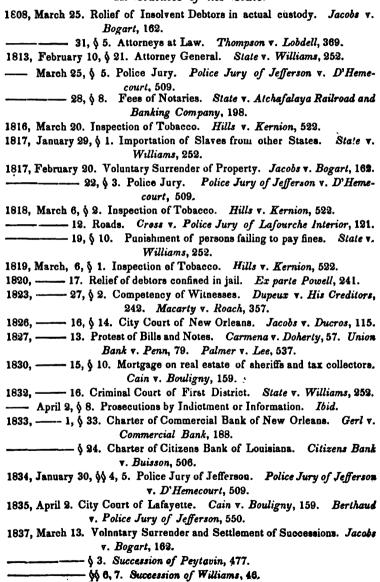
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I. Statutes of the United States.

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man, 387.

SUBROGATION.

See Mortgage, 11.

SUCCESSIONS.

- I. Jurisdiction in Matters of Succession.
- 11. Executors and Administrators.
- III. Claims against Successions.

IV. Sale of Property of Successions.

V. Heirs and Legatees.

I. Jurisdiction in Matters of Succession.

When the heirs of a succession, being of age, have accepted it unconditionally, or, being minors, have come into possession of it as beneficiary heirs after the administration has legally terminated, they must be sued in courts of ordinary jurisdiction for any debts due by the succession. C. P. 996.

Self v. Morris, 24.

2. Whenever a succession is accepted with benefit of inventory, and minors cannot accept in any other way, it must be administered as a vacant estate, under the authority of the Probate Court; and all claims against it must be sued for in that court, against the administrator appointed to settle it.

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3. District Courts have jurisdiction of an action by heirs to compel the transfer to them of stock owned by the deceased where there are no debts due by the succession. Per Curiam: Such a case is not one of those enumerated in arts. 924, 925 of the Code of Practice as coming exclusively under the power and jurisdiction of Courts of Probate, which being of limited and special jurisdiction cannot take cognizance of matters which, though relating to a succession, are not placed by law under their immediate control and jurisdiction. Le Page v. Gas Light and Banking Company, 183.

II. Executors and Administrators.

- 4. A natural tutor is entitled to administer the property of his children without giving security, (C. C. 327, 330); but he cannot administer upon a succession opened in their favor, without having been appointed administrator, and giving security as any other individual. C. C. 1037. It is only after such an appointment that he can be considered as the representative of the succession, and be sued as such in the Court of Probates for the debts due by the estate. Self v. Morris, 24.
- 5. Any creditor of a succession administered under the supervision of a Court of Probates, may, at any time, compel the administrator to render a full and perfect account showing the true situation of the succession, and to make a distribution of the funds in his hands, according to a tableau of distribution, to be homologated by the court, after due notice to all the creditors. C. C. 1056 to 1058, 1167 to 1170. C. P. 1053 to 1055. Act 13 March, 1837, § 6, 7. Succession of Williams, 46.
- An account rendered by an administrator of a succession cannot be homologated ex parte. It must be submitted to the court contradictorily with all the creditors. Ibid.
- 7. An administrator is entitled to credit for payments made by him to creditors of the succession, though without authority from the Court of Probates, where the sums paid do not exceed the amounts which the creditors were entitled to receive. *Ibid*.

- The account rendered by an administratrix should show that everything on the inventory has been sold or otherwise accounted for, or it should not be homologated. Succession of Kendrick, 138.
- Notice to the parties interested must be given before any order can be made homologating a tableau of distribution filed by an administratrix, and directing the debts of the succession to be paid conformably thereto. Ibid.
- 10. A prayer for the removal of an administratrix, presented for the first time on an application for a new trial, after judgment overruling an opposition to an account filed by her, is too late. To notice such a prayer on appeal, no issue thereon having been made or tried below, would be to assume original jurisdiction. 1bid.
- 11. Where opposition is made to the account presented by an administratrix, the items objected to must be specified, and the grounds of objection briefly and clearly stated, that she may have full notice thereof. *Ibid*.
- 12. On a prayer for the removal of an administratrix the grounds of the application must be stated that she may have notice thereof. *Ibid*.
- 13. Where one of two persons designated by a testator to act as his executor in a certain event, presents a petition to the Probate Court to be confirmed as executor, and makes the other a party to the proceeding, and the latter contests his right, and, by a reconventional demand, asserts a better right to the appointment, the former cannot, by withdrawing his petition, defeat the demand of the latter. Succession of Gourjon, 422.
- 14. The fact that one named as an executor has become a bankrupt since the death of the testator, and before his application to be recognized as such, does not disqualify him. Per Curiam: The law (C. C. art. 1150) contemplates a change in the condition of the executor, after he shall have entered on the discharge of his duties, by becoming a bankrupt, as good ground for removal; but it does not follow that he becomes legally disqualified for a future appointment, by such a change. Ibid.
- 15. The third section of the stat. of 13 March, 1837, which makes it the duty of executors, &c. "to deposit all moneys collected by them, as soon as the same shall come into their hands, in one of the chartered banks of this State, or in one of their branches, allowing interest on deposits, if there be one in the parish, &c., and on no account to remove said deposit or any part thereof, until a tableau of distribution is homologated, or unless ordered by a competent court, &c.," under the penalty of being condemned to pay for the use of the estate twenty per cent per annum interest on the amount not so deposited, or withdrawn without order, besides all special damage, and of dismissal from office, being highly penal, must be rigidly construed. Where there is no bank in the parish in which the executors reside and the succession is under administration, paying interest on deposits, the executors are not bound to deposit the funds, the object of the law being not so much the safety of the funds, as the rendering of them productive.

Succession of Peytavin, 477.

16. In proceedings against an executor to render him personally liable for debte

due to the succession in consequence of alleged neglect, it is for him to exonerate himself by showing reasonable diligence. *Ibid*.

- 17. The mere fact of not bringing suit to recover a debt due to the succession is not conclusive proof of want of due diligence on the part of the executor.
- 18. Petition for the removal of an administratrix for failing to comply with the 5th sect. of the stat. of 16 March, 1842, which provides that "whenever the testamentary executor or other administrator of a succession shall suffer ten days to elapse after his confirmation or appointment, without having either qualified, or caused an inventory to be at least begun, the Judge shall forthwith and ex officio appoint a successor." The judgment appointing the administratrix was signed on the 25 September, and on the 6 October, she was sworn, and obtained an order for an inventory. On the 11th of October petitioner applied for her removal. Held, that not having qualified before or on the 5th of October, when the ten days expired, the Judge might in his discretion, have afterwards refused to allow her to do so, but that having permitted her to take the oath on the 6th, it was too late afterwards to object that she had not qualified sooner; and that the statute does not require that both the oath should be taken and the inventory begun within the ten days.

 Succession of Hart, 534.

III. Claims against Successions.

- 19. Where presumptive heirs remain in possession of an estate, without having accepted it or made an inventory, persons holding claims against it must cite them to declare whether they accept or renounce the succession. 1029. If they declare that they accept, or are silent, or make default, they shall be considered to have accepted as unconditional heirs, and may be sued as such, (C. C. 1030); but this provision does not apply to minors, who cannot accept an inheritance purely and simply. If the heirs of age declare that they wish to take the benefit of inventory, and to have delay for deliberating, or if the heirs are minors, who cannot accept otherwise, the judge must cause an inventory to be made, and appoint an administrator to manage the property. C. C. 1031, 1039, 1034 to 1040. The administrator thus appointed has the same powers, and is subject to the same duties and liabilities, as the curator of a vacant estate. C. C. 1042. C. P. 992, 994. If, after the expiration of the delay for deliberating, the heirs declare that they are not willing to accept the succession but with the benefit of inventory, the administrator shall proceed to liquidate and settle the affairs of the succession, and the balance, after the payment of the debts, will belong to the heirs. C. C. 1051. Self v. Morris, 24.
 - 20. A judgment pronounced in another State by a court of competent jurisdiction, against an administrator appointed to represent a defendant, who died pendente lite, and after answering, ascertaining the balance due by the deceased on the settlement of a partnership, in the absence of any proof that such judgment is not as valid by the laws of the State in which it was pronounced as if rendered against the heirs themselves, is prima facie evidence.

against the succession in this State, and sufficient to support a judgment by default. Const. U. S. art. 4, s. 1. C. P. 122. Per Curiam: We are not prepared to say, that it is conclusive against the heirs or executor here.

Tait v. Lewis, 206.

21. Although the distinct interest of the wife, or of her representatives, attaches at the time of the dissolution of the marriage, subject to the right to renounce and be exonerated from the payment of the community debts, they can claim nothing from the community until such debts are paid. No action can be maintained by them for the half of the price of any specific property acquired during the marriage, where it is not shown, by a liquidation of the community, that there are any gains to be divided. Fortier v. Slidell, 398.

See 1, 2, 5, supra. 28, infra.

IV. Sale of Property of Successions.

22. Lands belonging to a succession, though situated in another parish, may be sold by the probate judge of the parish in which the succession is opened.

Chaney v. Gray, 144.

V. Heirs and Legatees.

- 23. As a succession opened in favor of minors can be accepted for them only with benefit of inventory, it cannot be said to be their property, and does not legally come into their possession, until it has been duly administered, when, whatever may remain after the payment of debts, will fall under the administration of their tutor. C. C. 1051. Arts. 327 and 330 of the Civil Code provide only for the administration of the separate and exclusive property of minors, in which no other person is interested. Self v. Morris, 24.
- 24. Where a debtor of a succession becomes entitled to the succession by inheritance from the heir, his debt will be extinguished by confusion only to the amount remaining after the payment of all the debts of the estate. C. C. 2214. If the debts are unpaid, the executor may recover from the debtor the amount necessary to pay them: or if they have been discharged by advances made by the executor, he may recover from the debtor the amount of such advances, the debt of the latter being extinguished only to the amount coming to him from the succession after the payment of all its debts.

Brunetti v. Barnabé, 117.

25. An attorney in fact appointed by the natural tutrix of minor heirs residing abroad, cannot represent the heirs in the settlement of the succession of their father, opened in this State, where the property left by the deceased was held in community, and the natural tutrix as surviving spouse, has rights which must be exercised contradictorily with the minor heirs. In such a case, an attorney must be appointed to represent the absent heirs. C. C. 1654. Per Curiam: If the natural tutrix were present, having rights to exercise contradictorily with the minor heirs she could not represent them; an under-tutor alone could act for them. C. C. 301.

Succession of De Lizardi, 167.

26. The heir acquires the succession of the person from whom he inherits immediately after the death of the latter. This right is vested in him by operation of law alone, before he has taken any step to put himself in possession. One of its effects is to authorize him to institute any action which the deceased had a right to institute, and to prosecute those already commenced. C. C. 934, 935, 936, 939. He cannot be required, in order to authorize him to sue, to show that he has been recognized as heir, and put in possession of the estate by a decree of the Court of Probates of the place where the succession was opened. All that can be required of him is to furnish satisfactory evidence of his right to inherit. The recognition of the heir by the Probate Court is only required where he seeks to compel a curator, executor or administrator to render an account. C. P. 1000, 1001, 1002, 1003.

Le Page v. Gas Light and Banking Company, 183.

- 27. Where the remainder of an inheritance, after deducting the amounts received by some of the children from their father as an advance upon their hereditary shares in his succession, but not declared to be an advantage or extra-portion, is not sufficient for the legitimate portion of the other children, including in the estate of the deceased the property which the children who have received such advance would have collated had they become heirs, the latter, though they have renounced the succession, will be obliged to collate to the amount necessary to complete such legitimate portion. C. C. 1315. The fact that the other heirs have accepted the succession with the benefit of inventory, does not affect their right to claim such collation. Had they accepted unconditionally they would have become personally liable to the creditors of the succession, to whose advantage alone the collation would have enured. The obligation to collate is founded on the equality which should prevail among heirs called upon to divide the succession of their father, mother, or other ascendant, and on the presumption that whatever has been given to a part of them was so given as an advance upon what they might one day expect from the succession of the donor. C. C. 1307, 1309, 1312, 1313, 1491, 1735. Grandchamps v. Delpeuch, 429.
- 28. Where a father, who while solvent, had made advances to some of his children upon their hereditary shares in his succession but not as extra-portions, dies insolvent, his estate, so far as his forced heirs are concerned, must be considered as consisting only of the advances so made, and the disposable portion must be calculated on their amount. But the creditors of the deceased have no right to look to such advances for the payment of their claims as the amounts so advanced did not belong to their debtor at the time of his death. *Ibid*.
- 29. Where some of the children who had received advances from their father upon their hereditary shares in his succession not made as extra-portions, and who subsequently renounced his succession, are compelled to collate in order to make up the legitimate portion of the other children, they can claim only the disposable portion. Having renounced the succession, they can claim no share in the balance remaining after deducting such disposable portion. *Ibid*.

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30. Where property acquired under a will executed in another State is brought by the legatee into this State, where he dies, it must descend according to the laws of this State. The right of inheriting property situated here cannot be governed by the laws of another State, though originally acquired and brought from that State. Penny v. Christmas, 481.

See 3, 19, supra.

SUMMARY PROCEEDINGS.

The widow and heirs of a surety on an appeal bond cannot be proceeded against in the same manner as the surety himself may be, under the 20th sect. of the act of 20 March, 1839, amending art. 596 of the Code of Practice. In authorizing the summary remedy provided by that act, the legislature contemplated no other proceedings than those against the surety himself. Saulet v. Trepagnier, 227.

SUPREME COURT OF THE UNITED STATES.

On a question as to the constitutional authority of Congress, and the consequent restriction upon the power of State Legislatures, a decision of the Supreme Court of the United States must be regarded as settling the law.

State v. Fullerton-Re-hearing, 219.

SURETY.

The surety in a sequestration bond cannot be made responsible for any injury to the property sequestered, prior to the date of the bond.

McMichael v. Gillispie, 13.

2. Action against defendants, who had guarantied plaintiffs against any less they might sustain as sureties on bonds for the payment of duties, to recover the amount of certain bonds which they had been compelled to pay, with interest. Held, that plaintiffs were entitled to recover the amount of the bonds paid by them, with interest thereon at six per cent from the time of such payment. Act of Congress of 2 March, 1799, § 65.

Toole v. Durand, 363.

See Sequestration, 1. Summary Proceedings.

TAX.

The statute of 27 March, 1843, providing a fund for the support of the Charity Hospital of New Orleans directs the masters of vessels and steamboats arriving at the city of New Orleans to collect, and pay to the collector suppointed by the Charity Hospital, the tax imposed by that act on every passenger on the vessel or steamboat, under his command, and authorizes the masters of such vessel or steamboat, in case any passenger shall refuse to pay said tax, to detain and sell a sufficient proportion of his or her baggage for the payment thereof. The statute imposes no penalty on the master of any

such vessel or steamboat for refusing to collect or pay over such tax. In an action against the master of a steamboat to recover the amount of the tax imposed on passengers arriving on his boat during a certain period, which he had refused to collect: Held, that the tax being imposed exclusively on passengers, and not on the captain, officers or crew of the vessel whose labor is necessary for navigating it, and who may be regarded as among the instruments of commerce, cannot be regarded as a regulation of commerce; that the enactments of this statute cannot be said to be an usurpation of the power to "regulate commerce with foreign nations and among the several States" exclusively vested in Congress by the constitution of the United States, (art. 1, § 8); that its provisions are not inconsistent with any law of Congress regulating commerce; nor is the imposition of such a tax prohibited by the first section of the act of Congress of 8 April, 1812, which provides as a condition upon which the State may be admitted into the Union, that the navigable waters leading into the Gulf of Mexico shall be common highways and forever free to all the inhabitants of the Union, without any tax, duty, toll or impost therefor, imposed by the said State, that act having no further application since the admission of Louisiana into the Union; but that the statute, not having imposed any penalty on the master for refusing to collect the tax, the court cannot supply the omission, and condemn him to pay the tax as a penalty for not having complied with the statute by collecting it from his passengers.

State v. Fullerton, 210.

TESTAMENT.

See Donations Mortis Causa.

TUTOR.

See Minor.

TRUST, DEED OF.

- In the State of Mississippi, in which the common law prevails, a debtor, though insolvent, may, by a deed of trust, grant a preference to a part of his creditors; and, having a right to determine which of them shall be paid, he may dictate the terms of payment. Layson v. Rowan, 1.
- In the case of a mortgage or deed of trust, the possession of the property by the mortgagor or debtor, until the sale, is not inconsistent with the deed, and raises no presumption of fraud. Ibid.
- 3. The fact that one of the parties for whose benefit a deed of trust was executed by an insolvent, in another State, is a son of the debtor, does not authorize the conclusion, in the absence of other proof, that the debt is fraudulent. Ibid.
- 4. A debt to secure which a deed of trust has been executed, may be describ-

ed by the name of the debtor, and its amount be left to be ascertained. Id certum est, quod certum reddi potest. Ibid.

- 5. It is no objection to the validity of a deed of trust under the common law, that the cestui que trust is not a party to the deed, nor that the trustee is not a creditor of the debtor who executed it. Ibid.
- 6. The rights of an assignee of a deed of trust executed in another State, must be determined by the conditions of the assignment. In proceeding under the deed of trust he must conform to the conditions on which it was assigned to him. Tupper v. Scott. 323.
- 7. Where a deed of trust requires that public notice shall be given for a certain number of days of any sale made under it, the particular day on which the sale is to take place, must be notified to the public for the time required. If, after such notice, the sale be postponed, new notice must be given, for the full time required, of the day to which it is postponed. Ibid.

WARRANTY.

See SALE, II.

END OF VOLUME VII.

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A copy of a letter from the Hon. Lewis H. Sandford, Vice-Chancellor of the State of New York.

New York, February 2, 1846.

MESERS. BANKS, GOULD & Co.

Gentlemen—Mr. Barbour kindly sent to me, some time ago, his Treatise on the Practice of the Court of Chancery, with an Appendix of valuable precedents.

I have examined it with all the interest one naturally feels in a subject which has occupied so many years of his time and attention, and I take great pleasure in saying that it is the most clear, full, and at the same time, concise Treatise on Chancery Practice which we have in this country.

It embraces all that is excellent in the late Treatise of Mr. Daniel on the English Practice, as well as the valuable parts of the older publications of Harrison, Maddock, Newland and Grant.

To the American solicitor it is of course indispensable, and it supersedes to a great extent the English books. For to say nothing of its containing all the pertinent English decisions since Daniel was published, it contains the American Practice, as modified by our laws, and established by our courts and adjudications. And although the English Chancery has in its recent Orders, drawn largely from Chancellor Walworth's Rules of the New York Court of Chancery, yet its orders and its practice are in many respects so different from our own, that a considerable portion of their books of Practice is useless to us. Besides, in Mr. Barbour's work there are many heads of the most ordinary and frequent jurisdiction of the New York

Chancery fully developed, which are either entirely unknown, or of limited use and different in mode in the English Practice. Such are Judgment Creditors' Suits, Sale of Mortgage Premises, Sale, &c. Infant Lands, Proceedings respecting Lunatics, &c. Divorce, Partition, and the like.

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Respectfully yours, &c.

LEWIS H. SANDFORD.

Extract of a Letter from Judge Story.

Cambridge, Nov. 25, 1844.

The work of Mr. Barbour on Chancery Practice, appears to me entitled to high approbation for its completeness, accuracy and clear method. I am persuaded that it must (as it ought to) have a very extensive circulation among the profession throughout the States of the Union. He seems to me to have nearly exhausted the materials, which are appropriate to American Practice, without having overlooked the importance of those furnished by the English Authorities and Treatises.

From the Law Reporter, June, 1844.

We are free to confess, that, on first seeing this great book, our prepossessions were against it. We shrunk, with something like want of heart, from its ponderous size. It seemed a sort of mare magnum, into which we were loath to enter. But a careful examination of its massive contents, has led us to the conclusion that it is a thorough collection of the rules, principles, and cases, which illustrate the practice in chancery, embracing the results of the English writers and decisions on the subject, in conjunction with the adjudications in the United States, particularly in New York, to which State the author belongs.

But though we cannot rank it high among contributions to the science of jurisprudence, still the author deserves the thanks of all engaged in the practice of chancery, for an important companion and guide in their labors. The English treatises on the subject are notoriously unsatisfactory to the practitioners in our country. The treatise of Mr. Hoffman too often fails to enlighten the path which his English brethren have left in obscurity. The present work is larger and more comprehensive than any of its predecessors, and, in the courts of our country, will be found to possess a higher practical value.

The work is divided into six books, for the purpose of marking the several stages of a suit, or indicating the nature of the proceedings treated of. These books are divided into chapters, which are subdivided into sections.

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From Judge Willard.

I have examined Mr. Barbour's Treatise, and have a high opinion both of its plan and execution. It embraces a subject of extensive importance, and will be found eminently useful to those who are entrusted with the administration of criminal law. As a compendium of that branch of our jurisprudence, it will be interesting also to the general reader. A work of this kind has long been needed in this state. No lawyer or magistrate will deem his library complete without it. Mr. Barbour has exhibited industry and discrimination in the arrangement of the subject, and the selection of his cases to support the text. It thus becomes valuable as a digest and book of reference. The forms which are arranged in the appendix, are sufficiently comprehensive, and are carefully prepared. They add much to the value of the book, especially for justices and others, for whose use they were mainly intended.

JOHN WILLARD

Saratoga Springe, January 15, 1841.

From Samuel Stevens, Esq.

Albany, January 21, 1841.

W. & A. GOULD & Co.

Gentlemen—I have perused with attention, and I must add with high gratification, Mr. Barbour's work on criminal law. It is, I believe, the only original work on that branch of the law which has been attempted in this state. So far as my humble opinion can add any thing to the deservedly high reputation of the author for industry and learning, it affords me much pleasure to recommend this book to the profession, as a work every way worthy of the important branch of the law of which it treats. The perspicuous exposition of the principles of criminal law; the clear definition of the various kinds and grades of offences; together with a great variety of precedents for the necessary process and proceedings in the various stages of criminal prosecutions, must render the work invaluable—indeed, almost indispensable to the magistrate who has not had the advantage of a professional education.

Respectfully and truly yours,

SAMUEL STEVENS.
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From N. Hill, Jr. Esq.

Amsterdam, January 22, 1842.

MESSES, WM. & A. GOULD & Co.

Accept my thanks for the opportunity afforded me of perusing Mr. Barbour's forth-coming work on criminal law. I have devoted considerable attention to it, and am gratified to witness the success with which he has explored this hitherto somewhat neglected but eminently interesting and important department of legal science. No other American treatise, upon a similar plan, has, to my knowledge, been given to the public; although the absence of one has long been the subject of regret, and the occasion of serious embarrassment. Mr. Barbour can hardly be too highly commended for having completely obviated, as I think he has, the deficiency mentioned. The volume in question cannot fail to prove a most valuable acquisition to our law libraries; indispensable, indeed, to every professional man, and magistrate, whose duties call them to participate in the administration of criminal justice.

Yours, &cc.

N. HILL, JR.

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Extract of a Letter from Judge Story.

Cambridge, May 25, 1842.

MESSES. GOULD, BANKS & Co.

Gentlemen— * Judge Conkling's Treatise on the Organization and Jurisdiction of the Courts of the United States, is an exceedingly valuable work for the variety of information which it contains, and the general ability and accuracy with which it has been drawn up. It supplies a want hitherto extensively felt in the profession, and I cannot doubt that it will possess a large circulation, as its merits deserve.

I am, with the highest respect,

Your obedient servant,

JOSEPH STORY.

From the late Judge Thompson.

Gentlemen—Be pleased to accept my acknowledgments for the Treatise of Judge Conkling, on the Organization, Jurisdiction, and Practice of the Supreme, Circuit, and District Courts of the United States, which you did me the favor to send me. It was received during the sitting of the Circuit Court, when I had not time to give it that examination which I wished before expressing my opinion of it. I have since examined it with considerable attention, and think it a work of great merit, upon which much labor must have been bestowed by the author. I am aware of no book, containing so accurate and extensive details of the various subjects embraced within it. It is a Treatise, in my opinion, highly useful to the public, and almost indispensable to professional gentlemen who practice in the Courts of the United States.

I am very respectfully yours, &c.

SMITH THOMPSON.

Messes. Gould, Banks & Co. August 30th, 1842.

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- "Chapter II.—Foreign Country and King. State. County. Town. Churchwarden. Corporate Body. Company. Associated Member. Joint Owner. Partner. Joint Tenant. Tenant in Common. Coparcener.
- "Chapter III.—Chaucellor and Vice-Chancellor. Attorney General. Coursel. Scicitor. Attorney. Sheriff. Receiver. Arbitrator. Auctioneer. Pawner. Bailee. Broker. Witness. Holder of a Copyright.
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&c. &c.: Diplomatic Writings on Questions of International Law, useful for Public Ministers and Consuls, and for all others having official or commercial intercourse with Foreign Nations. By Jonathan Elliot.

From the President of the United States.

Washington, May 17, 1834.

Sir—My public duties have been too urgent to allow me an opportunity to examine, very carefully, the copy of the American Diplomatic Code, which you were pleased to present to me. Allow me to say, however, after a hasty glance at its contents, that I consider it a very desirable accession to the library of the statesman. Not doubting that the great mass of important information which it contains, will entitle it to general circulation, I can only add the expression of my hopes, that the labor and talent you have bestowed upon it, will meet with a suitable reward.

I am, very respectfully, yr. obt. servant,

Andrew Jackson.

JONATHAN ELLIOT, Esq.

From the Secretary of State.

Washington, June 30, 1834.

To JONATHAN ELLIOT, Esq. Editor of the American Diplomatic Code.

Sir—It gives me pleasure to state, that, from the examination I was able to give to your work, I was satisfied of its value to those engaged in the Diplomatic service of the United States; and, therefore, caused it to be distributed among all our Diplomatic Agents, as well as to the principal Consuls; and have, likewise, adopted it for the use of the Department of State.

I am, very respectfully, Sir, your ob. servt.

Louis McLEAN.

From an Associate Justice of the Supreme Court of the United States.

Washington, February 15, 1834.

Dear Sir—I have run over, though you may well suppose rather hastily, your American Diplomatic Code. It appears to me to be a very valuable work, for all persons who desire to have a knowledge of our Diplomatic History, of our Treaties, and of the general principles of Public Law applicable to our Foreign Relations. It seems to me, also, almost indispensable for the library of a statesman, and the researches of a jurist. It supplies a void which has been long felt and lamented; and I cannot doubt that it will obtain general success by the fulness, as well as the variety of its important materials.

I am, very respectfully, your obliged servant,

JOSEPH STORY.

JONATHAN ELLIOT, Esq.

From a Representative in Congress from Pennsylvania.

Dear Sir—I have no doubt the American Diplomatic Code will prove a work of convenient reference to all those who are disposed, or required, to give their attention to the Diplomatic Relations of the United States, or to the principles of National Law.

I am, very respectfully, your ob. serv.

Hor. BINNEY.

April 4, 1834.

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Extract of a Letter from Judge Story.'

Cambridge, Nov. 25, 1844.

MESSES. GOULD, BANKS & Co.

Gentlemen— * * Mr. Lubé's Analysis of Equity Pleadings is a very good compendium of the outlines of the science, and cannot fail to be of great utility to students and young practitioners as an introduction, brief and yet accurate, to the leading principles. *

I am with great respect,

Truly your obliged servant,

JOSEPH STORY.

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From Joseph Henry Lumpkin, Lexington, Geo.

Lexington, July 20, 1841.

MESSES. GOULD, BANKS & Co.

Gentlemen — I avail myself of the first leisure moment since the receipt of the last box of

books which you forwarded, including "Clerke's Digest," of New York Reports, to communicate to you, my opinion of the merits of this work. And this I may do in a word, by remarking, that it is surpassed by no similar publication; and, so far as I am able to judge, equalled only by Peters' Digest of cases decided in the Courts of the United States. They are both got up pretty much upon the same plan.

By way of testing its accuracy, I have referred to many of the Reports from which the Digest was composed—having the pleasure of owning all except Coleman's Cases of Practice, Caines' and Hall's Reports, and Anthon's Nisi Prius—and in every instance, have found that the principle has been stated with the utmost fidelity.

Yours truly,

Jos. H. LUMPEIN.

Also, highly flattering recommendations have been received from Chancellos Kent, Judge Bronson, and other distinguished lawyers.

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From the Hon. Joseph Story.

Cambridge, July 24, 1840.

MESSES. GOULD, BANKS & Co.

Gentlemen—It was not until a few days ago, that I had the pleasure of knowing, by your letter of the 6th of July, from what source I had received a copy of the new American edition, published by you, of Mr. Phillippe' work on Evidence, in four volumes, which some time ago came to my hands. I beg you now to accept of my sincere thanks, for this most acceptable present. I have long considered Mr. Phillippe' work on Evidence, as the most thorough, accurate, and able, that I have ever seen; and I have used it more constantly than any other. The seventh edition, which you have re-published, has been materially improved by the learned author, with the assistance of his distinguished friend, Mr. Amos. Your Edition, with the very extensive and learned notes of Mr. Justice Cowen and Mr. Hill, to the first volume, and those of the anonymous editor of the second volume, appears to me entitled to a decided preference over all others, for an American Lawyer. It seems to me the most ample, as well as most satisfactory collection of principles and authorities upon this most important subject, that I have ever seen. I cannot doubt that it will receive an extensive patronage from the profession, proportionate to its great merits.

I am with the highest respect, truly your most obliged friend and servant,

JOSEPH STORY.

From Thomas W. Clerke, Esq.

New York Law School, May 22, 1843.

MESSES. GOULD, BANKS & Co.

Gentlemen—In answer to your question as to the result of my experience of Justice Cowen's edition of Phillipps' Treatise on Evidence, as a text book, I now state that it has exceeded my expectations. You are aware, that the interesting subject of Evidence engaged nearly our exclusive attention for several months of the session, thus having an ample opportunity of testing its merits.

The original work is so well known, that it is scarcely necessary for me to say, that whether as a text book for students, or a work of reference and study for practitioners, it is unequalled in precision of language, felicity of arrangement, and the general fidelity with which the cases, illustrating its positions, are transcribed. With respect to the voluminous notes of Justice Cowen,—in every respect they equal the text in all the qualities which I have mentioned, and surpass it in learning and research; showing certainly not less legal acumen, and greater industry,—industry untiring and almost incredible, when we consider the other avocations of the editor. Altogether, I am sure, that all who have bestowed adequate attention on this able work, will unite with me in pronouncing it an invaluable acquisition to the legal profession in this country.

Yours sincerely,

T. W. CLERKE.

Also, highly flattering testimonials have been received from the Hon. Simon Greenleaf, the Hon. Sam. J. Hitchcock, and other distinguished lawyers.

4 |

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RUDIMENTS OF AMERICAN LAW AND PRACTICE, on the Plan of Blackstone. Prepared for the use of Students at Law, and adapted to Schools and Colleges. By Thomas W. Clerke, Counsellor at Law.

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Chapter VI.—Of the persons capable of committing crime.

Chapter VII .- Of principals and accessories,

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Extract of a Letter from Judge Story.

Cambridge, May 25, 1842.

MESSES. GOULD, BANKS & Co.

Gentlemen— • • Mr. Clerke's Radiments of American Law and Practice, appears to me to be drawn up with great care; and to condense in a brief form a great deal of learning, highly useful to students at law, and well adapted to the highest classes in our colleges; and especially for students in the State of New York.

I am with the highest respect, Your ebedient servant.

JOSEPH STORY

From the Hon. S. Greenleaf.

Cambridge, May 14, 1842.

MESSRE. GOULD, BANKS & Co.

Please accept my sincere thanks for the copy of Mr. Clerke's Radiments which you were so kind as to send me. I have looked it over with some attention and think he has successfully executed all that he proposed in his proface, and that it will prove a very acceptable hand-book to those for whose use it was intended, particularly within the State of New York, to whose laws it has especial reference. The plan of the work is excellent, and the author's judgment is evinced in the selection of the sources from which he has drawn; excepting that I think he should, at this day, have derived the law of Bailments and Equity from the works of Mr. Justice Story, rather than from those of Sir William Jones and Mr. Jeremy.

Very respectfully yours,

8. GRENLEAR
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- SANDFORD'S CHANCERY REPORTS. 1 Vol. Reports of Cases argued and determined in the Court of Chancery of the State of New York. Before the Hon. Lewis H. Sandford, Assistant Vice-Chancellor of the First Circuit.
- SAUNDERS' REPORTS. 3 Vols. The Reports of the Most Learned Sir Edmund Saunders, Knight, late Lord Chief Justice of the King's Bench, of several Pleadings and Cases in the Court of King's Bench, in the time of the Reign of His Most Excellent Majesty King Charles the Second. Edited, with Notes and References to the Pleadings and Cases, by John Williams, one of his late Majesty's Serjeants at Law. Fifth Edition. By John Patteson, of the Middle Temple, now one of the Judges of the Court of Queen's Bench, and Edward Vaughan Williams, Barristers at Law. In Three Volumes. Sixth Edition. By Edward Vaughan Williams. 1846.
- SESSION LAWS. The Session Laws of the State of New York, from 1821 to 1846, inclusive. In Twenty-five Volumes.
- SHERMAN'S MARINE INSURANCE. An Analytical Digest of the Law of Marine Insurance, containing a Digest of all the Cases adjudged in this State, from the earliest Reports down to the present time. With References to an Appendix of Cases decided in the Supreme, Circuit and District Courts of the United States, from the earliest period down to the year 1830. By Henry Sherman, Counsellor at Law, New York.

From the Hon. Judge Sherman, of Conn.

Fairfield, Conn. Dec. 28, 1841.

Dear Sir—I had the pleasure and the honor to receive your friendly note, and the volume which it accompanied. There is no other State in the Union where the law of Marine Insurance has received so frequent and able discussion as in New York, or whose courts were more competent to settle and apply, by decisions commanding the highest respect, the principles which compose that important branch of jurisprudence. Your Digest of these decisions, with references to those of the National Courts contained in your appendix, will be useful in the libraries of gentlemen of the bar, not in your own State only, but in every other. Your arrangement is convenient for ready reference, and the compilation, so far as my opportunity for perusal will enable me to judge, is faithful and judicious.

Accept my grateful acknowledgments for the testimony of friendship and respect which you have here presented. The work gives proof of industry and talents which guaranties the future usefulness and respectability of its author: a consideration from which, be assured, dear Sir, I derive the highest satisfaction.

Very sincerely yours,

RÖGER M. SHERMAN.

From the Hon. Charles Chauncey, Philadelphia.

Philadelphia, January 3, 1842.

Dear Sir—I have received the copy of your Digest, which you were so kind as to send me, with your very acceptable note of the 22d ult. I have examined the Digest with some care, and am pleased that your labor has been employed upon so important a subject, and that you have been eminently successful in your effort. I think the profession is largely in-

debted to you, for the manner in which the work has been done. I beg you to accept my thanks for your kind attention in sending me the work.

I am, dear Sir, respectfully, yr. ob't serv't,

CH CHAUNCEY.

From the Hon. Alfred Conkling, Judge of the United States District Court for the Northern District of New York.

Albany, January 29, 1842.

Dear Sir—I am very much obliged to you for the copy, you have been so kind as to send me, of your work on the Law of Marine Insurance. After the best examination I have been able to give it, it appears to me to be a well digested, well arranged, and very useful book. I think very favorable also of the composition of the work. The style is neat and perspicuous, and the language correct and precise. I think it cannot fail to be advantageous to your reputation.

Believe me, my dear Sir, with great regard, very truly yours,

A. CONKLING.

From the Hon. Thomas Day, Hartford, Conn.

Hartford, January 22, 1842.

Dear Sir—I thank you for the copy you sent me of your Digest of the Law of Marine Insurance. From the examination I have given it, I think it has extrinsic merits, and I shall value it besides for the giver's sake. I send you herewith a copy of the first part of 14 Conn. Rep. which is just out. It contains several able opinions of Judge Sherman, which I have no doubt you will read with much interest. The appendix, if it fails to interest, may at least amuse you.

Yours truly,

THOMAS DAY.

From Judge Hitchcock, Professor in the Law School, New Haven.

New Haven, May 2, 1842.

Dear Sir—I have examined your Digest of the Law of Marine Insurance, containing all the New York cases, with an appendix of cases decided elsewhere; and I take pleasure in saying that the work is a useful manual for the practising lawyer, and valuable as a book. of reference for the student and the scientific teacher, inasmuch as it furnishes in a detached and condensed form a multitude of cases scattered through numerous volumes too costly to be generally purchased, and requiring more time for a thorough investigation of all the cases they contain than the student, practitioner, or teacher, can conveniently devote to the subject. Allow me to express my thanks for a copy received, and to add a hope that you may be remunerated for your labors.

With much respect, your friend and former instructor,

SAMUEL J. HITCHCOCK.

From the Hon. John Duer.

13th April, 1843.

Dear Sir—I thank you sincerely for the honor you have done me in presenting me with a copy of your valuable Digest of American decisions on Marine Insurance, and doubt not that I shall find it of much use in the researches in which I am engaged.

With your uncle, to whom your work is inscribed, I am well acquainted, and entertain for him the high respect to which his talents and character so greatly entitle him.

Very truly yours,

JNO. DUEL.

From the Hon. Judge Vanderpoel.

New York, 28th February, 1844.

My dear Sir-I have too long delayed acknowledging the receipt of your Digest of the

Law of Marine Insurance. I have looked through it with considerable care and attention. As my professional pursuits, before my appointment to the Bench, were not of a character to render me very familiar with the Law of Marine Insurance, my attention has recently been devoted to that branch of jurisprudence. I have found your book a great auxiliary in my attempt to gain some knowledge of the subject of which it treats and have no hesitation in recommending it to the Bar as a highly useful and meritorious work.

Yours very truly,

A. VANDERFORL.

- STARKIE'S NISI PRIUS. Reports of Cases determined at Nisi Prius, in the Courts of King's Bench and Common Pleas, and on the Circuit, from the Sittings after Michaelmas Term, 55 Geo. III. 1814, to the Sittings after Michaelmas Term, 57 Geo. III. 1816, inclusive. By Thomas Starkie, of Lincoln's Inn, Barrister at Law.
- STEVENS AND BENECKE ON AVERAGE AND INSURANCE.
 Treatises on Average, and Adjustments of Losses in Marine Insurance. By
 Stevens and Benecke. With Notes by Willard Phillips.
- SWANSTON'S CHANCERY REPORTS. Reports of Cases argued and determined in the High Court of Chancery, during the time of Lord Chancellor Eldon. From the commencement of the Sittings before Hilary Term, 1818, to the end of the Sittings after Michaelmas Term, 1819. By Clement Tudway Swanston, of Lincoln's Inn, Barrister at Law. First American, from the last London Edition. With Notes and References to American Cases. By Henry W. Warner, Solicitor and Counsellor in Chancery. In Three Volumes.
- TILLINGHAST'S BALLENTINE ON LIMITATIONS. A Treatise on the Statute of Limitations. [21 Jac. I. c. 16.] By William Ballentine, of the Inner Temple. To which are added, Notes of the Decisions made by the Supreme and Circuit Courts of the United States, and by the Courts of the several States, whose Decisions have been reported, upon the Limitations of Actions at Law and Suits in Equity: and Notes of Decisions made in the English Courts to the present time, except those cited in the Text. Together with the Statutes of Limitations of the State of New York; a summary of the Statute of Limitations of the several States of the United States, and of the Law of Prescription of Louisiana; and a Chronological Digest of the English Statutes of Limitations. By John L. Tillinghast, Counsellor at Law.
- TILLINGHAST'S FORMS. A General Collection of Forms and Precedents, for Process, Entries and Pleadings in Civil Actions at Law; adapted to the Revised Statutes of the State of New York. By John L. Tillinghast, Counsellor at Law.
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- VAN NESS' PRIZE CASES. Reports of Two Cases determined in the Prize Court for the New York District. By the Hon. Wm. P. Van Ness.
- WARREN'S LAW STUDIES. A Popular and Practical Introduction to Law Studies. By Samuel Warren, of the Inner Temple, Esq. F. R. S. From the last London Edition.
- WENTWORTH'S INDEX. A complete Index to Wentworth's System of Pleading. Compiled with a view to lessen the labors of the Profession in referring to those valuable Precedents.
- WIGRAM ON WILLS. Examination of the Rules of Law respecting the admission of Extrinsic Evidence in aid of the Interpretation of Wills. Third Edition, with American Notes and References.
- WHEATON'S LAW OF NATIONS. History of the Law of Nations in Europe and America, from the Earliest Times to the Treaty of Washington, 1842. By Henry Wheaton, L. L. D., Minister of the United States at the Court of Berlin, Corresponding Member of the Academy of Moral and Political Science in the Institute of France. 1845. See American Law Magazine, Law Reporter, Hunt's Merchant's Magazine, and American Review.

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Conclusion.

WHEELER'S CRIMINAL CASES. Reports of Criminal Law Cases, with Notes and References; containing also a view of the Criminal Laws of the United States. By Jacob D. Wheeler, Counsellor at Law. In Three Volumes.

ADVERTISEMENT.

The work will contain all the criminal cases tried in the courts of the United States, and of the several states since the period of the revolution. It will also contain state papers in this department of law—the opinion of eminent men, and the forms used in criminal proceedings. In short, it is intended to embrace the whole range of criminal jurisprudence.

Circulars have been addressed to the members of the bar, judges, &c. in the different states for the purpose of obtaining these trials, &c. and the kindness of these gentlemen, and the attention of numerous other correspondents, authorize the editor to insure his friends the collection will be complete.

The importance of the work, and the magnitude of the undertaking, it is expected will ensure it some attention, not only from the profession, but also from those who feel themselves interested in the literature of our country. It is the first and only attempt that has been made to rescue from oblivion, important and interesting criminal trials that have taken place in the United States, and which, independent of their immediate usefulness to the lawyer, are highly important to the statesman and philosopher. "They exhibit human nature in all its varity of forms and color."

The first and second volumes of this work have been published. The first volume is principally filled with cases collected in the courts of this city; the second volume contains a treatise on the criminal laws of the United States, more extensive than can be found in any

other book; and as far as the editors and publishers have been able to learn, the work has met with the decided approbation of the gentlemen of the bar.

New York, September 6, 1824.

DEAR SIR:—I thank you for the information I have received from the perusal of your two volumes of "Reports of Criminal Law Cases," and I consider publications of such a nature extremely important to the interest and safety of the community. The code of criminal law cannot be too thoroughly studied, nor too precisely understood, by every person concerned in the administration of justice. To render such collections safe and valuable, the details of the facts and proceedings in such case ought to be full and scrupulously accurate. I am happy to learn that you propose to enlarge your plan (as you have already begun in your second volume) so as to embrace the reports of state trials throughout the Union. You will be obliged to confine yourself to cases of the most solemn import and of the greatest interest, and I wish you every possible encouragement, and the most extensive support. I am decidedly of opinion, that judicial proceedings, especially in criminal cases, ought to be laid open in the most authentic manner, to the intelligent and impartial observation of the public.

I am, with great respect and regard, your ob't. Serv't.

JAMES KENT.

JACOB D. WHEELER, Esq.

New York, September 11, 1824.

DEAR SIR-II have perused with much satisfaction, your two volumes of "Reports of Criminal Law Cases," which you had the goodness to leave with me. A collection of cases, of this nature has been long desired by our profession, and cannot fail to prove extremely useful. Our criminal code differs materially from that of England, and renders reports of our own criminal and state trials highly important to every practising lawyer. I cannot withhold my approbation of the manner you have adopted in preparing these reports, and of the labor and talents you have displayed. I hope you will be amply remunerated, and thus encouraged to pursue the laudable undertaking. I cordially recommend them to public patronage.

I am, dear Sir, respectfully, your friend,

J. O. HOFFMAN.

JACOB D. WHEELER, Esq.

New York, September 15, 1824.

DEAR SIR.—Various circumstances have as yet prevented my perusing the reports of Criminal Trials which you have already published, with that accuracy which would justify my passing an opinion on them; particularly as my business rarely calls me into the criminal courts. I can however say with great pleasure that I highly approve of the publication you now propose, to comprehend the important trials and decisions of criminal cases in our own courts, and those of the other states of the Union. I very sincerely wish you success, reputation and emolument from its execution.

I am, Sir, with much respect, your obedient servant,

THOMAS ADDIS EMMET.

JACOB D. WHEELER, ESQ.

New York, September 3, 1824.

DEAR SIR.—Although aware how little importance is usually attached to recommendations of this kind, I have the pleasure to think, in common with many of your brethren at the bar, your work possesses strong claims to public patronage. Criminal trials interspersed with annotations, and a brief analysis of the law applicable to each class of cases as they arise in practice, stamp your work with originality of plan, while it has the more rare merit

of combining general instruction with judicial precedent, and addressing itself with just pretensions of atility equally to the public and to the bar. Allow me to add, he must read your cases with indifference, who does not perceive them to be selected with care, intermingled with matter evincing much and attentive reading; digested with discrimination, and expressed in a style concise and perspicuous.

Your's respectfully,

D. GRAHAM.

JACOB D. WHEELER, Esq.

New York, September 6, 1824.

DEAR SIR.—The manner in which you have heretofore edited your "Criminal Law Reports," entitles you to the unqualified approbation of our profession.

Your proposed plan of reporting every criminal case throughout the Union, will enable the profession of our own state to avail itself of the learning and researches of that of the sister states. It will tend to produce an uniformity in the trial, and perhaps the punishment of offenders in the several states, and preserve a portion of our history highly interesting to all classes of our people.

I beg leave to express my entire confidence in your fitness for this important work, and my earnest wishes for your success.

Your's truly,

WILLIAM M. PRICE.

JACOB D. WHEELER, Esq.

New York, September 3, 1824.

DEAR SIR.—Your object in making a collection of American State Trials is highly meritorious, and its faithful execution will deserve the thanks of the profession.

Many trials, involving questions interesting to the American lawyers and politicians, have not yet been published.

Your reports of Criminal Law Cases, with notes and references, furnish ample testimony of the patience, industry and talent, which will be exerted in giving a character to your proposed work.

With great confidence in the success of your undertaking, and with the best wishes for your prosperity.

I am, very respectfully, your obedient servant,

H. MAXWELL.

JACOB D. WHEELER, Esq.

New York, September 4, 1824.

Dear Siz.—I am gratified to find, that you intend publishing all the interesting Criminal Trials which have taken place throughout the United States. The crisis is favorable to such an enterprise. Our law must every day become more rational, and it is highly desirable that it should be uniform. Such a compilation of American Cases, will furnished the contemplative reader with subjects of comparison, the surest way of knowledge; and the notes and references to English authorities, made by one so competent as I know you to be, will open a vast field of useful speculation, and a sure road to the general advancement and improvement of our criminal jurisprudence.

Your's respectfully,

WILLIAM SIMPSON.

JACOB D. WHEELER, Esq.

TO THE PATRONS OF THIS WORK.

Notwithstanding I have detailed the plan of this work in the numbers as they have been issued from the press, and in the public journals, I cannot omit saying a word or two here, at

the close of the second volume, in relation to it. My object is, to collect and publish every criminal trial that has occurred in the United States, making a complete collection of American State Trials. They will contain trials in full, decisions of the judges, state papers, legislative reports, &c., and every thing that can tend to throw light upon, or elucidate the criminal jurisprudence of our country. They will, in most instances, be published entire; and if all the cases, &c. can be collected, (and I have not the least doubt, from the mass of matter already in my possession, they can,) it is difficult to conceive a publication of greater importance, in a national point of view, than such a collection would be; nor of one more useful to those gentlemen engaged in the practice of the criminal law.

To make the work still more valuable, the cases hereafter will be set up in type similar to that of the preface in this volume: by that means a much greater quantity of matter will be printed on a page, without any additional expense to subscribers. It is also contemplated to add to each volume, in the form of an appendix, the forms weed in criminal proceedings in the United States. They will be printed with the greatest care and accuracy.

I hope the preface to this volume will be found useful as a reference, &c. The acts of Congress have been copied verbatim, and the construction given to them by courts of justice follow, each in their order: so that the reader will have before him the statutes of the United States, and the adjudication of the courts upon them.

If it can aid the learned, who have not time to look into a great number of books for principles collected within the small compass of this preface; or if it can assist those who are beginning their studies, and are at a loss for a connected and systematic view of the principles of criminal jurisprudence, I shall congratulate myself on being of some little service to those to whom I am always willing to be indebted; and for the time, expense and trouble, (for really it has cost me not a little of either,) shall consider myself amply remunerated.

J. D. WHERLER.

New York, July 15th, 1824.

YATES' PLEADINGS AND FORMS. A collection of Pleadings and Practical Precedents, with Notes thereon, and approved Forms of Bills of Costs; containing, also, References, &c., to Graham's Practice, Second Edition. By John V. N. Yates, Counsellor at Law.

INTRODUCTION.

No work has appeared, since the Revised Statutes were passed, containing precedents of proceedings in courts of record in this state, except the book "of forms and precedents," compiled seven years ago, by Mr. Tillinghast, the greater part of which was printed before all the Revised Statutes were published; consequently his forms, in several respects, have been materially affected or rendered inappropriate by those and other statutes subsequently passed and by the judicial decisions giving construction to them.

To remedy this evil, the present compilation is offered to the profession and the public. It cannot, however, be reasonably supposed, nor is it pretended, that within the compass of one volume every precedent necessary in a suit at law can be contained. All that is pretended or hoped, is, that it does embrace many useful forms to aid the student, and the bar, in the progress of litigation. From standard law writers, such as Lilly, Richardson. Chitty, Tidd, Archbold, Story, and others, the compiler has freely drawn for precedents. He has also resorted to our own reporters for the same purpose. In every instance he has sought to make those precedents conform to the existing statutes. On some occasions, too, he has adopted pleadings drawn by able counsel, in causes then actually pending in our courts. He ought likewise to add, that some of the forms, particularly in ejectment, partition and replevin, he has taken from Mr. Tillinghast's volume; but he must say at the same time, that he has taken the liberty of altering and modifying them in several particular and interest of the same time, that he has taken the liberty of altering and modifying them in several particular and in the same time, that he has taken the liberty of altering and modifying them in several particular and interest a

lars, (except such of them as the Supreme Court had revised and adopted) and also of adding others under the same heads.

The compiler has given in this work precedents in mandamus, prohibition and audita querela and in the actions of account, waste and nuisance. He thought they were wanted by the bar, and has accordingly furnished them. He has also given consecutively the forms usually adopted in conducting a suit to a judgment by default and on verdict. He cannot flatter himself that the work is wholly free from censure. Exclusive of the errata which have been noted, (and most of which arose on account of his absence from the city of Albany during the revision of the work,) there may be others justly liable to criticism. He has endeavored to remove at least one objection; an objection often and truly made against books of this kind, that of having a confused or imperfect Index. He has endeavored in this work to give a full and complete Index, together with an Analytical Table, and he hopes they will both prove faithful guides. The order in which he intended the forms to appear has sometimes been deranged: he trusts however, that this is but a venial error, and if the precedent be found, the inquirer for it will probably feel indifferent as to the particular part of the book in which it may have been inserted. In conclusion he states that there are states and some practical forms in this work which may prove useful, though not falling strictly within the scope or purpose of its publication; he has also furnished an ebstract of precedents, &c. contained in our own reports, and a table of abbreviations.

THE COMPILER.

ALLEN ON SHERIFFS. The Duties and Liabilities of Sheriffs, in their various Relations to the Public and to Individuals as governed by the Principles of the Common Law, and regulated by the Revised Statutes of the State of New York. Revised, corrected, and enlarged. By Otis Allen, Counsellor at Law. 1845.

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